(25,408)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 578.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ISAAC W. CARR AND FANNIE G. ESTES, PARTNERS, DOING BUSINESS AS ISAAC W. CARR & CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the Honorable the Justices of the Supreme Court of the State of New Jersey, possessors of the record of the proceedings and judgment in an action at law in which Isaac W. Carr and Fannie G. Estes, Partners doing business as Isaac W. Carr & Co., are plaintiffs and The Pennsylvania Railroad Company, a corporation, is defendant, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Errors and Appeals, in the last resort in all causes, of the State of New Jersey, wherein final judgment upon return from the said Supreme Court of the State of New Jersey was rendered on the eleventh day of February, A. D., nineteen hundred and sixteen, said Court of Errors and Appeals being the highest Court of law and equity of the said State of New Jersey in which a decision could be had in the action at law in which said Isaac W. Carr and Fannie G. Estes, Partners doing business as Isaac W. Carr & Co., are appellees or respondents, in said Court of Errors and Appeals, and plaintiffs below, and said The Pennsylvania Railroad Company, a corporation, is appellant in said Court of Errors and Appeals, and defendant below; which record was by the judgment of said Court of Errors and Appeals remitted to you and is now before you in said Court whereon judgment has been entered in said Supreme Court of the State of New Jersey, pursuant to and as directed by said judgment of said Court of Errors and Appeals, wherein was drawn in question the right, privilege or immunity from liability of said defendant below under statutes of the United States and the decision was against such right, privilege or immunity from liability, manifest error hath happened to the great damage of the said The Pennsylvania Railroad Company, as by its complaint appears; and

2 we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf,

Do command you, if judgment be thereupon given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the Constitution, laws and customs of the United States should be done.

Witness, Honorable Edward D. White, Chief Justice of the United

States, the 15th day of June, A. D., One thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the United States Supreme Court.

Allowed by
OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] Supreme Court of the United States. Isaac W. Carr and Fannie G. Estes, Partners doing business as Isaac W. Carr & Co., Plaintiffs, Def'ts in Error, vs. The Pennsylvania Railroad Company, a corporation, Defendant, Pl't'ff in Error. Writ of Error. Returnable July 14, 1916. Vredenburgh, Wall & Carey, 1 Exchange Place, Jersey City, N. J., Attorneys for Plaintiff in Error. June 20, 1916. Received Copy. Queen & Stout, Att'ys for Def'ts in Error.

The Answer of the Justices of the Supreme Court of the State of New Jersey Within Named.

The record and proceedings whereof mention is within made with all things touching and concerning the same we do certify to the Supreme Court of the United States in a certain schedule as within we are commanded.

[Seal of the Supreme Court.]

WM. S. GUMMERE, *C. J.*

4 New Jersey Supreme Court.

ISAAC W. CARR and FANNIE C. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs-Appellees,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant.

Action at Law. On Appeal. Remittitur.

It appearing by the Remittitur now here returned from the Court of Errors and Appeals, that the judgment of this Court removed by appeal in the above entitled cause, was in and by said Court of Errors and Appeals, affirmed with costs,—

It is Ordered that said Remittitur be filed and that the said cause be proceeded with according to law.

Entered February 25, 1916.

On motion of

QUEEN & STOUT,
Attorneys for Plaintiffs.

5 *Prayer for Reversal.*

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs, Defendants in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Defendant, Plaintiff in Error.

On Writ of Error.

To the Honorable the Supreme Court of the United States:

And now comes The Pennsylvania Railroad Company, a corporation, plaintiff in error, and prays for a reversal of the judgment of the Court of Errors and Appeals of the State of New Jersey, and the judgment of the Supreme Court of the State of New Jersey, entered in conformity therewith or in pursuance thereof, in the action brought by the above named defendants in error against the above named plaintiff in error; and it also prays that the order of said Court of Errors and Appeals entered in the office of the Clerk of the Court on the 11th day of February, 1916, ordering that the judgment of the said Supreme Court of New Jersey be in all things affirmed and that the record and proceedings be remitted to the said Supreme Court to be proceeded with in accordance with said order and judgment and the practice of said Court, be reversed, as well as the judgment of said Supreme Court of New Jersey entered by the Clerk of said Court on Judge 14, 1915, which was affirmed by said order and judgment of said Court of Errors and Appeals, in the last resort in all causes.

VREDENBURGH, WALL & CAREY,
ALBERT C. WALL,
JOHN A. HARPENCE,
Attorneys of the Pennsylvania Railroad Company.
No. 1 Exchange Place, Jersey City, N. J.

[Endorsed:] Supreme Court of the United States. 36985. 145/29. Isaac W. Carr and Fannie G. Estes, Partners doing business as Isaac W. Carr & Co., Plaintiffs, Def'ts in Error, vs. The Pennsylvania Railroad Company, a corporation, Defendant, Pl't'ff in Error. Prayer for Reversal. Vredenburgh, Wall & Carey, Attorneys for Plaintiff in Error, 1 Exchange Place, Jersey City, N. J. Filed Jun- 24, 1916. Wm. C. Gebhardt, Clerk.

6 UNITED STATES OF AMERICA, *ss:*

To Isaac W. Carr and Fannie G. Estes, partners doing business as Isaac W. Carr & Co., Greeting:

You are hereby cited and admonished to be and appear, and each of you is hereby cited and admonished to be and appear, before the Supreme Court of the United States, at the City of Washington, within thirty days from the date hereof, pursuant of a writ of error

filed in the office of the Clerk of the Supreme Court of the State of New Jersey, wherein The Pennsylvania Railroad Company, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this 15th day of June, A. D., one thousand nine hundred and sixteen.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

6½ [Endorsed:] Supreme Court of the United States. 36985. 145/29. Isaac W. Carr and Fannie G. Estes, Partners doing business as Isaac W. Carr & Co., Plaintiffs. Def'ts in Error, vs. The Pennsylvania Railroad Company, a corporation, Defendant, Pl'ff in Error. Citation. Returnable July 14, 1916. Vredenburgh, Wall & Carey, Attorneys for Plaintiff in Error. 1 Exchange Place, Jersey City, N. J. Filed Jun- 24, 1916. Wm. C. Gebhardt, Clerk. Service of within citation acknowledged this 20th day of June, A. D. 1916. Queen & Stout, Att'ys for Def'ts in Error.

7 *Assignments of Error.*

Supreme Court of the United States.

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Car- & Co., Pl't'ffs, Defendant-in-Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Def't, Plaintiff-in-Error.

On Writ of Error to New Jersey Supreme Court.

To the Honorable the Justices of the Supreme Court of the United States:

And now comes The Pennsylvania Railroad Company, the plaintiff-in-error, and makes and files this, its assignment of error.

There is manifest error in the record and proceedings herein—

(1) Because the Court of Errors and Appeals of the State of New Jersey, erred in affirming the refusal of the New Jersey Supreme Court upon the trial of the cause in the Hudson Circuit, at the close of the whole case, to direct a verdict in favor of the defendant and against the plaintiff.

(2) Because the said Court of Errors and Appeals erred in affirming the order of the New Jersey Supreme Court, striking out the interrogatories submitted by defendant to plaintiff, dated March 19, 1915, which were framed to ascertain the ownership of the property involved in the various shipments covered by the suit.

8 (3) Because the said Court of Errors and Appeals erred in affirming the ruling of the New Jersey Supreme Court upon the trial at the Hudson Circuit, sustaining the objection of the plaintiff to the admission of evidence designed to show the ownership of the property involved in said shipments, and also in refusing to direct a verdict in favor of defendant because plaintiffs had not shown ownership thereof.

(4) Because the said Court of Errors and Appeals erred in affirming the ruling of the New Jersey Supreme Court upon the trial at the Hudson Circuit, on the motion to direct a verdict in favor of the defendant at the close of the whole case, after the defendant, the present plaintiff in error, had proved a strike, which was an excepted cause in the bills of lading relieving the defendant from liability except in case of negligence, that the burden of proving absence of negligence of the defendant was upon the defendant, and remained there throughout the whole case.

(5) Because the said Court of Errors and Appeals erred in affirming the New Jersey Supreme Court upon the trial at the Hudson Circuit in ruling upon the motion to direct a verdict in favor of the defendant at the close of the whole case, that the burden of proving negligence of defendant did not rest upon the plaintiffs after the defendant had proved a strike, which was an excepted cause in the bills of lading relieving it from liability except in case of negligence.

(6) Because the said Court of Errors and Appeals erred in affirming the New Jersey Supreme Court in refusing to rule upon the trial at the Hudson Circuit that, under all the facts of the case it was for the Court to determine, as a matter of law, that the defendant was not negligent, and was not liable to the plaintiffs for any loss or damage occasioned by the holding back of the watermelons, having proved that the cause thereof was a strike, which, under a stipulation in the bills of lading covering the respective shipments,
9 exempted the defendant from liability in such event, said bills of lading having been issued in accordance with the directions of the Act to Regulate Commerce, its amendments and supplements, and forming a contract between the parties by which their respective rights were to be determined, and in therefore refusing to direct a verdict in favor of the defendant.

(7) Because the burden was upon the plaintiffs to establish negligence of defendant resulting in the loss or damage complained of, and the New Jersey Supreme Court at the trial of the Hudson Circuit should have directed a verdict in favor of defendant at the close of the whole case, because plaintiffs had failed to sustain that burden and there was not sufficient evidence of such negligence in the case to go to the jury, and that therefore, under the contracts between the parties, made in pursuance of the statutes of the United States, the defendant was not liable to plaintiffs for such loss or damage; which said New Jersey Supreme Court refused to do, and which said refusal was affirmed by said Court of Errors and Appeals.

(8) Because said Court of Errors and Appeals erred in affirming the ruling of the New Jersey Supreme Court, upon the trial at the Hudson Circuit, that the plaintiffs, the present defendants in error.

were entitled to recover as part of their damages in this suit, the amount of the freight charges which accrued upon the shipments in the action under the tariffs and schedules filed by the defendant, the present plaintiff in error, with the Inter-State Commerce Commission, at Washington, D. C., in accordance with the provisions of the said Inter-State Commerce Acts of Congress.

10 (9) Because the said Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, because there is no evidence of negligence of the defendant in the case proximately resulting in the loss or damage complained of, and judgment should have been given by said New Jersey Supreme Court in favor of the defendant and against the plaintiffs, whereas judgment was rendered in said New Jersey Supreme Court in favor of the plaintiffs and against the defendant, the present plaintiff in error.

And the plaintiff in error prays that the judgment aforesaid may be reversed, annulled and for nothing holden, and that the record be remanded to the Supreme Court of the State of New Jersey in accordance with the judgment and determination of this Court.

ALBERT C. WALL.
Attorneys of Plaintiff in Error.

11 [Endorsed:] 145/29. Supreme Court of the United States. Isaac W. Carr and Fannie G. Estes, partners doing business as Isaac W. Carr & Co., Pl't'ffs, Def't- in Error, vs. The Pennsylvania Railroad Company, a corporation, Def't, Pl't'ff in Error. On Writ of Error to New Jersey Supreme Court. Assignments of Error. Filed Jul- 12, 1916. Wm. C. Gebhardt, Clerk. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

12 I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do hereby certify, that in the case of Isaac W. Carr and Fannie G. Estes, partners, etc., vs. Pennsylvania Railroad Company, the foregoing and attached hereto is a true copy of the record remitted from the Court of Errors and Appeals of the State of New Jersey to this Court, and also of the Rule on Remittitur, Prayer for Reversal, Citation and Assignments of Error.

In witness whereof I do hereby set my hand and the seal of said Court at Trenton, this twelfth day of July, A. D., nineteen hundred and sixteen.

[Seal of the Supreme Court.]

WM. C. GEBHARDT, *Clerk.*

13 [Endorsed:] New Jersey Supreme Court. Isaac W. Carr and Fannie G. Estes, partners doing business as Isaac W. Carr & Co., vs. The Pennsylvania Railroad Company. Copy of Proceedings for Appeal to the United States Supreme Court. Queen & Stout, Attorneys for Plaintiffs. Vredenburgh, Wall & Carey, Attorneys for defendant. Clerk's Office, Trenton.

14 New Jersey Court of Errors and Appeals.

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs-Appellees,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant.

Action at Law.

On Appeal from the Supreme Court of New Jersey.

STATE OF CASE.

Queen & Stout, Attorneys for Plaintiffs-Appellees.
Vredenburgh, Wall & Carey, Attorneys for Defendant-Appellant.

15 *Notice of Appeal.*

(Filed June 15, 1915.)

New Jersey Supreme Court.

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Action at Law.

On Appeal from the Supreme Court of New Jersey.

To Queen & Stout, Esqs., Attorneys for Plaintiff:

Please Take Notice, that the defendant appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the whole of the judgment entered in this cause.

Dated June 14, 1915.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Service of a true copy of within Notice of Appeal is acknowledged this 14th day of June, 1915. Recognizance on appeal waived.

QUEEN & STOUT,
Attorneys of Plaintiffs.

16 *Grounds of Appeal.*

(Filed June 15, 1915.)

New Jersey Court of Errors and Appeals.

ISAAC W. CARR et al., Plaintiffs-Appellees,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant.

On Appeal from the Supreme Court of New Jersey.

Same as Olivit Bros vs. P. R. R. Co., "64 Count Case." See State of Case in that case (Nos. 68-71, 76-77, June Term Calendar, 1915, of this court), p. 41.

Service of a true copy of within Grounds of Appeal is acknowledged this 14th day of June 1915.

QUEEN & STOUT,
Attorneys of Plaintiff.

17 *Complaint.*

(Filed March 3, 1915.)

New Jersey Supreme Court, Hudson County.

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

The plaintiffs Isaac W. Carr and Fannie C. Estes, partners doing business as Isaac W. Carr & Co. who reside in the City, County and State of New York say that:

First Count.

1. On July 16th, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Statesboro aforesaid to Jersey City, in this State, one car load of watermelons of the value of $500, in car S. A. L. 16240, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid for reward.

2. The defendant, in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to
18 transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost

to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Second Count.

1. On July 16th, 1912, at Fuman in the State of South Carolina, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Fuman aforesaid to Jersey City in this State one car load of watermelons of the value of $500, in car Sou. 39213, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City, aforesaid, for reward.

2. The defendant, in violation of its agreement, failed and neglected to carefully transport the said watermelons from Fuman aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Third Count.

1. On July 16th, 1912, at Stilson in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Stilson aforesaid to Jersey City in this State, one car load of watermelons of the value of $500, in car C. of Ga. 6865, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

19 2. The defendant, in violation of its agreement, failed and neglected to carefully transport the said watermelons from Stilson aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Fourth Count.

1. On or about July 16th, 1912, at Ivanhoe in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Ivanhoe aforesaid to Jersey City in this State one car load of watermelons, of the value of $500, in car A. C. L. 32852, which the defendant then and there received and accepted, as such common carrier and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, in violation of its agreement, failed and neglected to carefully transport the said watermelons from Ivanhoe

aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiff and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Fifth Count.

1. On July 22nd, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Statesboro aforesaid to Jersey City in this State, one car load of watermelons of the value of
20 $500, in car A. C. L. 31057, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Sixth Count.

1. On July 25th, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Statesboro aforesaid to Jersey City in this State, one car load of watermelons of the value of $500, in car A. C. L. 21143, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

The defendant, in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Seventh Count.

21 1. On July 25th, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Statesboro aforeto Jersey City in this State, one car load of watermelons of the value of $500, in car S. A. L. 22576, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Plaintiff demands $500 damages on each count.

QUEEN & STOUT,
Attorneys of Plaintiffs.

22 ***Answer.***

(Filed April 1, 1915.)

New Jersey Supreme Court, Hudson County.

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Action at Law. (7 Counts.)

Defendant, a body corporate, organized under the laws of the State of Pennsylvania, having a place of business and office at No. 26 Exchange Place, Jersey City, Hudson County, New Jersey, says that:

First Defense.

(1) It denies the truth of the matters contained in the complaint and each and every count thereof.

Second Defense.

(1) Defendant, without admitting that the goods and property were delivered to it and accepted by it to be transported in the manner averred in the complaint, avers that if such property did come to the hands of the defendant for the purpose of the transportation thereof, it did so, as to each and every count of said complaint, under the terms and conditions of a certain Bill of Lading issued to
23 said plaintiff by the initial carrier of said property, pursuant to the provisions of the Act of Congress of June 20, 1906, (34 Stat. at Large, p. 584, 3591; U. S. Comp. Stat. Supp. 1911, p. 1288), and the supplements thereto and amendments thereof, commonly designated as the Inter-State Commerce Act, constituting an express agreement between the plaintiff and the defendant, whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from delay in the transportation and delivery thereof, if such delay was caused by a strike or strikes among defendant's employes; and defendant asserts that a

strike did take place among its employes and continued from the ninth day to the twenty-first day of July, nineteen hundred and twelve, which strike was the cause of the alleged delay, if any at all occurred, as alleged in said complaint.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Service of within Answer hereby acknowledged and consent given to filing as of time.
March 31st, 1915.

QUEEN & SCOTT,
Att'ys of Pl't'ff.

24 *Reply.*

(Filed April 1, 1915.)

New Jersey Supreme Court, Hudson County.

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiff-,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Action at Law. (7 Counts.)

The plaintiffs deny the truth of the matters contained in the second defense of the answer.

QUEEN & STOUT,
Attorneys of Plaintiffs.

25 *Stipulation.*

(Filed June 14, 1915.)

New Jersey Supreme Court.

ISAAC W. CARR and FANNIE G. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiff-,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Action at Law.

The parties to the above entitled action hereby consent that the record of the trial of the sixty-four counts case of Olivit Bros. vs. The Pennsylvania Railroad Company, tried at the December Term 1914, of the Hudson Circuit of the New Jersey Supreme Court, reserving to the defendant all exceptions and objections noted thereon, shall be made a part of the record of this action, in so far as the said record, exceptions and objections apply and reserving to defendant all rights of appeal.

The parties hereto further consent that judgment final be entered against the defendant and in favor of the plaintiffs based upon the record aforesaid and upon the pleadings and the stipulation in this action and that the plaintiff's damages be assessed at $1,841.13, reserving to defendant the right to reduce said judgment in accordance with its exceptions and objections pertaining to the measure of damages and without prejudice to defendant to appeal from said judgment pursuant to law.

26 It is thereupon ordered that judgment final be entered against the defendant and in favor of the plaintiffs for $1,841.13, with costs to be taxed.

We consent to the entry of the above rule.

QUEEN & STOUT,
Attorneys of Plaintiffs.
VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

27 *Judgment.*

(Entered June 14, 1915.)

Whereupon it is adjudged that the plaintiffs recover of the defendant the sum of one thousand eight hundred forty-one dollars and thirteen cents, with their costs, which are taxed at the sum of twenty-six dollars and seventy-eight cents, making in the whole the sum of one thousand eight hundred sixty-seven dollars and ninety-one cents.

Judgment entered June 14, 1915.

WM. S. GUMMERE, *C. J.*

$1,841.13
26.78

$1,867.91

By consent of the parties, this case was submitted upon the same testimony and trial record, in so far as they were applicable, as in the "64-Count Case" of Olivit Brothers vs. Pennsylvania Railroad Company, in which practically the same issues are involved, and judgment entered thereon accordingly. (See State of the Case in the Olivit Cases, Nos. 68, 69, 70, 71, 76 and 77, June Term, 1915, Calendar of Court of Errors and Appeals, pages 74, &c.)

Stipulated facts corresponding to Exhibit P-1 in the 64-Counts case of Olivit Brothers vs. Pennsylvania Railroad Company. (See State of Case in that case, pages 184, &c.)

28 *Stipulation.*

New Jersey Supreme Court, Hudson County.

ISAAC W. CARR and FANNIE C. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Action at Law. (7 Counts.)

Stipulation.

It is hereby stipulated by and between the parties hereto, that the following facts are admitted in evidence at the trial of this action, without formal proof, but without prejudice to either party to note objection thereto as irrelevant, immaterial or otherwise incompetent.

1. During the month of July, 1912, and at the time of the bringing of this action, the defendant was a common carrier by railroad for hire from Edgemoor, Delaware, to Second and Henderson Streets, Jersey City, New Jersey.

2. The defendant received and accepted from the Philadelphia, Baltimore & Washington Railroad Company, a connecting carrier, at Edgemoor, Delaware, at the time shown on the chart hereto annexed, the cars of watermelons mentioned in the complaint herein, to be transported to Jersey City, New Jersey, in accordance with the bills of lading issued by the initial carriers, covering each of said shipments respectively.

29 3. The defendant transported by freight train the said cars from Edgemoor, Delaware, to Jersey City, and placed them on its delivery tracks at its delivery yard, Second and Henderson Streets, Jersey City, New Jersey, for delivery of the watermelons to the consignees in said bills of lading, at the time shown on the chart hereto annexed, respectively, except as therein noted.

4. The usual or customary time during the month of July, 1912, to transport by freight train, without delay in transportation, a car of watermelons over the defendant's railroad line from Edgemoor, Delaware, to its public delivery yard at Second and Henderson Streets, Jersey City, New Jersey, was about seven hours, under the most favorable circumstances.

5. Receipts or bills of lading were issued by the initial carriers for the transportation of the said cars of watermelons and the plaintiffs were at the time of the bringing of this action and still are the lawful holders of the said receipts or bills of lading.

6. The said receipts or bills of lading shall be offered and admitted in evidence.

7. The said watermelons were in apparent good order when received and accepted by the defendant at Edgemoor, Delaware, and were in a decayed condition when delivered by the defendant to the

plaintiffs at the defendant's delivery yard, Second and Henderson Street, Jersey City, New Jersey.

8. Claims for damage to the said watermelons were made in writing by the plaintiffs to the defendant at the point of delivery within the time required by the said receipts or bills of lading.

9. The value of said watermelons at the place and time of shipment was $1,750.00, and the plaintiffs sold them at the place of delivery for $965.48, which was the best price they could obtain for them owing to their decayed condition.

10. The plaintiffs, on delivery to them by the defendant of the said watermelons, paid to the defendant all the freight charges for transportation of same, amounting to $786.41.

11. All of said shipments were interstate shipments subject to the Carrier's Bill of Lading, at the regular or reduced rate specified in the rate tariffs filed with the Interstate Commerce Commission and subject also to Rule 1 of the Southern Classification filed with said commission pertaining to said shipments which said rule shall be offered and admitted in evidence.

QUEEN & STOUT,
Attorneys of Plaintiffs.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

31

ISAAC W. CARR et al.
vs.
PENNSYLVANIA R. R. Co.

Count.	Car initial and number.	Edgemoor—Received from P. B. & W. R. R.	Meadows—Arrived.	Meadows—Left.	Harsimus—Arrived.	Jersey City—2nd & Henderson St. Ready for delivery.
1.....	S. A. L. 16240,	7-20, 8.05 P. M.	7-21, 12.15 A. M.	7-22, 6.55 A. M.	7-22, 11.30 A. M.	7-25, 10.05 A. M.
2.....	Sou. 39213,	7-19, 4.20 P. M.	7-19, 11.10 P. M.	7-22, 3.30 A. M.	7-22, 4.30 A. M.	7-23, 7.00 A. M.
3.....	C. of Ga. 6865,	7-22, 12.05 A. M.	7-22, 7.00 A. M.	7-25, 7.25 P. M.	7-25, 8.00 P. M.	7-26, 7.00 A. M.
4.....	A. C. L. 32852,	7-20, 8.05 P. M.	7-21, 12.15 P. M.	7-23, 6.55 A. M.	7-23, 11.30 A. M.	7-25, 7.00 A. M.
5.....	A. C. L. 31057,	7-26, 1.20 P. M.	7-27, 2.20 A. M.	7-31, 12.35 A. M.	7-31, 1.30 A. M.	8- 1, 8.15 A. M.
6.....	A. C. L. 21143,	7-30, 2.50 A. M.	7-30, 1.30 P. M.	8- 2, 5.40 A. M.	8- 2, 7.40 A. M.	8- 3, 8.15 A. M.
7.....	S. A. L. 22576,	7-30, 2.50 A. M.	7-30, 1.30 P. M.	8- 2, 5.40 A. M.	8- 2, 7.40 A. M.	8- 3, 8.15 A. M.

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32–279 *Bills of Lading.*

There were seven bills of lading covering the seven shipments in this case, of the same tenor as the "4-months' bill" in the "64 Counts Case" of Olivit Brothers vs. Pennsylvania Railroad Company.
(See State of the Case in that case, pages 208-209.)

280 New Jersey Court of Errors and Appeals, June Term, 1915.

No. 118.

ISAAC W. CARR et al., Trading, etc., as Isaac W. Carr & Co.,
Plaintiffs and Respondents,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant and Appellant.

Submitted July 5, 1915; Decided January 28, 1916.

Syllabus.

1. Any lawful holder of a bill of lading, issued by the initial carrier pursuant to the Carmack Amendment (Sec. 20 of the Interstate Commerce Act, as amended June 29, 1906, 34 U. S. Stat. at L. pp. 593, 595 par. 7) upon receiving property for interstate transportation, may maintain an action for any loss, damage or injury to such property caused by any connecting carrier to whom the goods are delivered.
2. When the last successive carrier seeks to relieve itself from liability for damages, caused by delay in an interstate shipment of watermelons, because the bill of lading contained a condition that the carrier, except in case of negligence, should not be liable for damage to property resulting from delay in transportation if such delay is caused by a strike, and the evidence tended to show (1) that the strike was over before the shipment was received by the carrier, and (2) that the delay was caused by the use by the carrier of the watermelon tracks at the destination point, during and following the strike, in the delivery of peaches usually delivered elsewhere, to the exclusion of watermelons, which were placed on storage
281 tracks at an intermediate point, the question whether the delay was caused by the negligence of the carrier or by the strike was for the jury.
3. In a suit against a carrier for damages caused by delay in an interstate shipment of watermelons, it is not erroneous for the trial judge to refuse to charge the jury "that it was the duty of the defendant to move the most perishable fruit first under the circumstances, and the holding back of less perishable fruit, viz: the watermelons, until the peaches had been delivered, was not negligence", when there was no evidence that the

peaches in question were more perishable than the watermelons in question at the time both were being handled by the carrier.

4. When the bill of lading of an interstate shipment contains a condition that the amount of any loss or damage for which the carrier is liable "shall be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee, including the freight charge, if prepaid, at the place and time of shipment," it is proper for the judge to instruct the jury that, if the carrier was liable, the plaintiff was entitled to recover the freight paid by him as a part of his damages.

On Appeal from the Supreme Court.

For the appellant, Vredenburgh, Wall & Carey.
For the respondents, Queen & Stout.

The opinion of the court was delivered by

TRENCHARD, *J.*:

This action was brought to recover damages for deterioration in condition of seven carloads of watermelons consigned from points in Georgia and South Carolina to the plaintiffs in Jersey City;
282 the deterioration being averred to have resulted from unnecessary delay in transportation.

The defendant company received each of these carloads in good condition from an intermediate carrier at Edgemoor, Delaware, and within a reasonable time after shipment by the initial carriers. Their point of destination was the defendant company's delivery yard at Second and Henderson streets, Jersey City. The usual and customary time for transportation of watermelons from Edgemoor, Delaware, to the point of destination, was seven hours. The delay in the present case occurred betwen these points and at a point on the "meadows" several miles west of their destination. When after a delay of four days, the melons were delivered to the plaintiffs at the point of destination, they were in a damaged condition due to such delay.

The jury, at the Hudson Circuit, found for the plaintiffs and the defendant company appeals from the consequent judgment.

We are of the opinion that the judgment must be affirmed.

It is contended that the trial judge erred in refusing to direct a verdict for the defendant company. We think not.

It is argued that such verdict should have been directed because the "plaintiffs had not proved ownership in the property in question either at the time of shipment, at the time of delivery, or prior to the commencement of the suit."

But there is no merit in this contention.

Any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack Amendment (Sec. 20 of the Interstate Commerce Act, as amended June 29, 1906, 34 U. S. Stat. at L. pp. 593,

595, par. 7), upon receiving property for interstate transpor-
283 tation, may maintain an action for any loss, damage or injury to such property caused by any connecting carrier to whom the goods are delivered. Adams Express Co. vs. Croninger, 226 U. S. 491.

In the case at bar each of the initial carriers of the carloads of melons in question executed and delivered to the plaintiffs, or their representatives, bills of lading therefor, and at the trial it was expressly stipulated that the plaintiffs were the lawful holders thereof.

The next reason urged why a verdict should have been directed is that "no negligence had been shown on the part of the defendant."

At the trial the defendant company sought to relieve itself from liability because the bills of lading for these shipments contain a condition that the carrier, except in case of negligence, shall not be liable for damage to property resulting from delay in transportation if such delay is caused by a strike. There was evidence of a strike among the longshoremen of the water front of New York which included the employees of the defendant company at the piers where fruit of this kind was usually delivered. But the evidence also tended to show that these shipments were received by the initial carrier, and by the defendant from the intermediate carrier, after the strike was over, and that the delay was caused by the use by the defendant company of the watermelon tracks at Second and Henderson streets, during and following the strike, for the delivery of peaches, usually delivered elsewhere, to the exclusion of watermelons which were placed on storage tracks at the "meadows". It was therefore clearly a jury question whether the delay was caused by the negligence of the defendant, and the motion for a direction of verdict for defendant was properly refused.

284 It is next contended that the judge erred in refusing to charge the jury as follows: "That it was the duty of the defendant to move the most perishable fruit first under the circumstances, and the holding back of less perishable fruit, viz: the watermelons, until the peaches had been delivered, was not negligence."

We think this request was properly refused. There was no evidence that the peaches in question were more perishable than the watermelons in question at the time both were being handled by the defendant company, and it would have been improper for the trial judge to have assumed to determine that question as a matter of law.

The last contention is that the judge erroneously instructed the jury that if the defendant was liable, the plaintiffs were entitled to cover the freight paid by them as a part of their damages.

We think this instruction was proper. The bills of lading in question contained a provision that the amount of any loss or damage for which the carrier is liable "shall be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid, at the place and time of shipment."

The judgment below will be affirmed, with costs.

Endorsed "Filed Jan. 28, 1916. Thomas F. Martin, Clerk."

285 State of New Jersey,

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true copy of an opinion read by said Court in the above-stated cause, November Term, 1915, as the same is taken from and compared with the original now remaining on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Thirty-first day of January A. D. 1916.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

[Endorsed:] New Jersey Court of Errors and Appeals, November Term, 1915. Between Isaac W. Carr et al., Trading, etc., as Isaac W. Carr & Co., Plaintiffs and Respondents, vs. The Pennsylvania Railroad Company, Defendant and Appellant. Opinion.

286 *Rule of Affirmance.*

ISAAC W. CARR and FANNIE C. ESTES, Partners Doing Business as Isaac W. Carr & Co., Plaintiffs-Appellees,

vs.

THE PENNSYLVANA RAILROAD COMPANY, Defendant-Appellant.

Action at Law. (7 Counts.)

On Appeal from Supreme Court.

This cause having been duly argued at the June Term, 1915, of this Court by Queen & Stout of Counsel for the Appellees, and Vredenburgh, Wall & Carey of Counsel for the Appellant, and the Court having considered the same, and finding no error in the record or proceedings in the Supreme Court:

It is thereupon ordered and adjudged that the said judgment of the Supreme Court be affirmed with costs: and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of

QUEEN & STOUT,
Attorneys for Appellees.

Filed Feb. 11, 1916. Thomas F. Martin, Clerk.

Record Remitted to New Jersey Supreme Court Feb. 23, 1916.

287 State of New Jersey,

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true copy of Rule on Affirmance, in re Isaac W. Carr and Fannie C. Estes, partners doing business as Isaac W. Carr & Co., Plaintiffs-Appellees, vs. The Pennsylvania Railroad Company, Defendant-Appellant, as the same, is taken from and compared with the original Filed Feb. 11, 1916 now remaining on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this twenty-seventh day of May A. D. 1916.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

[Endorsed:] New Jersey Court of Errors and Appeals. Between Isaac W. Carr and Fannie C. Estes, partners doing business as Isaac W. Carr & Co., Plaintiffs-Appellees, vs. The Pennsylvania Railroad Company, Defendant-Appellant. Copy of Rule.

288 State of New Jersey,

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of the complete record on appeal to said Court, in re Isaac W. Carr et al., Trading, etc., as Isaac W. Carr & Co., Plaintiffs and respondents, vs. The Pennsylvania Railroad Company, Defendant and appellant, as the same is taken from and compared with the original now remaining on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-fourth day of June, A. D. 1916.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

Endorsed on cover: File No. 25,408. New Jersey Supreme Court. Term No. 578. The Pennsylvania Railroad Company, plaintiff in error, vs. Isaac W. Carr and Fannie G. Estes, partners doing business as Isaac W. Carr & Co. Filed July 17, 1916. File No. 25,408.

FILED
DEC 16 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

No. 577

THE PENNSYLVANIA RAILROAD COMPANY
Plaintiff in Error

vs.

OLIVIT BROTHERS, a corporation

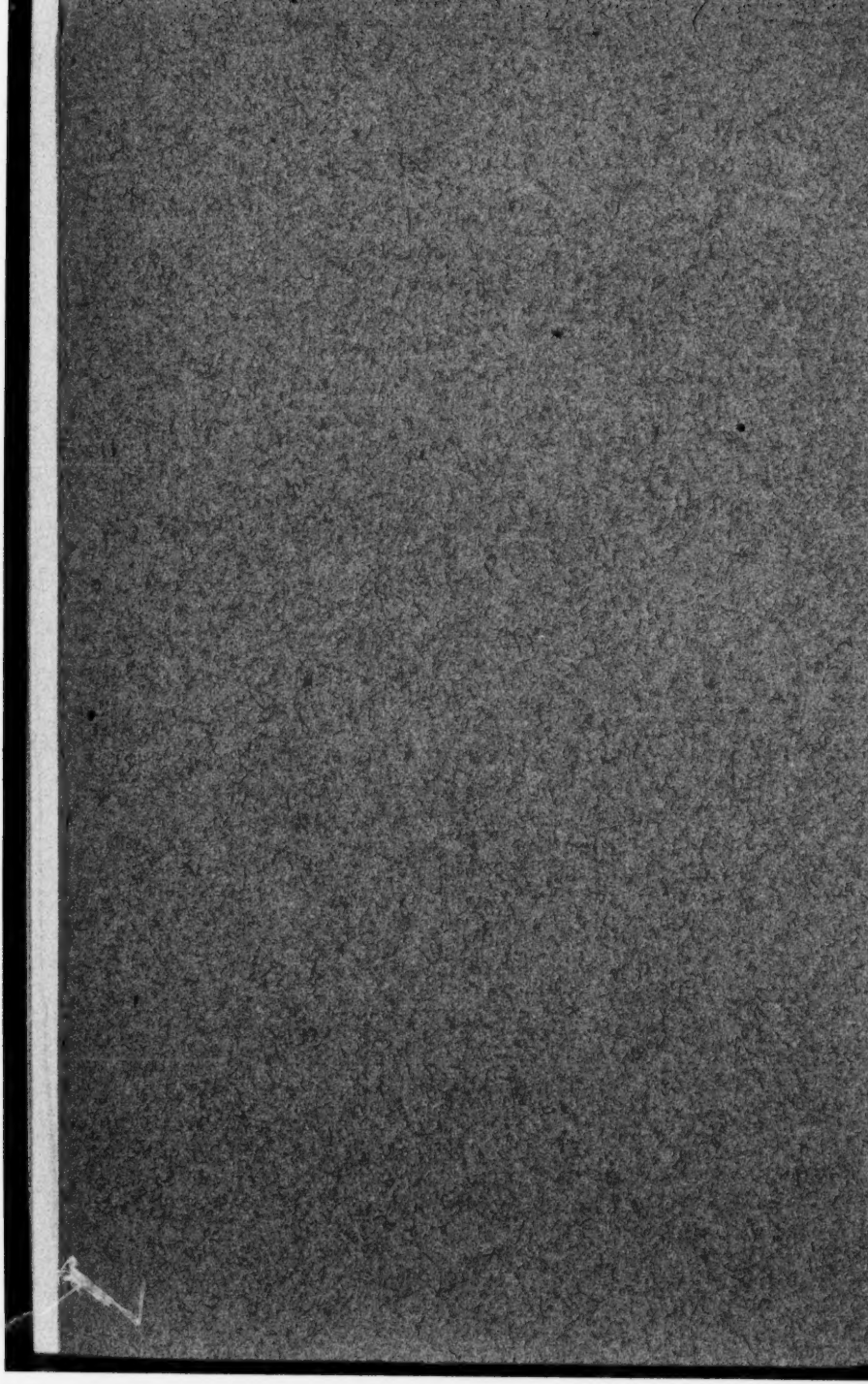
Motion to Dismiss Writ of Error Coupled with Motion to Affirm Judgment of Court Below

Brief for Defendant in Error Annexed

QUIEN & STOUT
GEORGE B. HOBART
Attorneys for Defendant in Error.

EDWARD P. STOUT
Of Counsel.

The Matthews-N. Gibbs Co., Cincinnati, O. U. S.
New York Office, 280 Broadway



IN THE

United States Supreme Court

OCTOBER TERM, 1916

No. 577

THE PENNSYLVANIA RAILROAD COMPANY
Plaintiff-in-Error,

vs.

OLIVIT BROTHERS, a corporation.

Motion to Dismiss Writ of Error to Review a Judgment of the Supreme Court of the State of New Jersey Coupled With a Motion to Affirm the Judgment of the Court Below

Now comes Olivit Brothers, a corporation, the defendant in error, by George S. Hobart and Edward P. Stout, its counsel, and moves this Court to dismiss and quash the paper purporting to be a writ of error for want of jurisdiction because no Federal questions appear in the record, as pointed out in the annexed argument; and the said defendant in error also moves this Court to affirm the judgment of the Supreme Court of the State of New Jersey, upon the ground that it is manifest that the Federal questions asserted by the plaintiff in error are

without merit and that the questions upon which it is claimed that the jurisdiction depends are so frivolous as not to need further argument.

QUEEN & STOUT,
GEORGE S. HOBART,
Attorneys for Defendant in Error.

George S. Hobart,
Edward P. Stout,
Of counsel.

Notice of Submission of said Motions to Dismiss and to Affirm

To Albert C. Wall, Esq., Attorney for Plaintiff in Error, 1 Exchange Place, Jersey City, N. J.

SIR:

PLEASE TAKE NOTICE, that on the record herein, we shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, January eighth, Nineteen Hundred and Seventeen, at the Capitol in the City of Washington, in the District of Columbia, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies; and we shall submit with said motions and in support of the same the argument hereto annexed.

Yours respectfully,

QUEEN & STOUT,
15 Exchange Place, Jersey City, N. J.

GEORGE S. HOBART,
243 Washington Street, Jersey City, N. J.
Attorneys for Defendant in Error.

George S. Hobart,
Edward P. Stout,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 577

THE PENNSYLVANIA RAILROAD COMPANY
Plaintiff in Error,
vs.
OLIVIT BROTHERS, a corporation.

BRIEF FOR DEFENDANT IN ERROR

Motion to dismiss writ of error to review a judgment of the Supreme Court of the State of New Jersey coupled with a motion to affirm the judgment of the Court below.

Statement of the Case

During the months of July and August, 1912, sixty-four carloads of watermelons were shipped from points in North Carolina to Second and Henderson Streets, Jersey City, New Jersey, consigned to Olivit Brothers, defendant in error. The Pennsylvania Railroad Company, plaintiff in error, was the delivery carrier. Bills of lading, which are in evidence (Rec. 126, Ex. P-7), were issued for these shipments by the initial carriers and Olivit Bros. was the lawful holder thereof (Rec. 116, par. 5). The shipments were received by The Penn. R. R. Co. from the Philadelphia, Baltimore and Washington Railroad Company, the connecting carrier, at Edgemoor, Delaware (Rec. 116, par. 2). The watermelons were delivered at the Delivery Yard of The Penn. R. R. Co., Second and Henderson Streets, Jersey City, (Rec. 116,

par. 3). Six tracks in that yard were used for the delivery of watermelons and were known as the watermelon tracks (Rec. 61). This portion of the yard was the watermelon market for New York and vicinity and was held out as such by The Penn. R. R. Co. to consignees and to the public (Rec. 62). Watermelons were delivered to consignees on these tracks in the early morning (Rec. 61) and sold by them at auction (Rec. 62). The unloading was done by consignees and not by employees of the railroad company (Rec. 62). The watermelons were in apparent good order when received by The Penn. R. R. Co. at Edgemoor and were in a damaged condition when delivered to Olivit Bros. at Jersey City (Rec. 116, par. 7). These watermelons were delayed in transportation by The Penn. R. R. Co. from three to nine days (Rec. 114, Ex. P-1), and it is admitted that the damage resulted from this delay (Rec. 51-52).

The Penn. R. R. Co., sought to relieve itself from liability because the bills of lading for these shipments contain a condition that the carrier, *except in case of negligence,* should not be liable for damage to property resulting from delay in transportation, if such delay was caused by a strike (Rec. 126, Ex. P-7).

The Penn. R. R. Co. attempted to prove that there was a strike among the longshoremen employed by it at Pier 29, New York City, continuing from July 9th, 1912, to July 18th, 1912, which was the proximate cause of the delay in the transportation of these watermelons (Rec. 63, 67). The strike was over before any of these shipments were received by The Penn. R. R. Co. at Edgemoor (Rec. 114, Ex. P-1); in fact, it was over before delivery of the shipments to the initial carriers (Rec. 29-30). Pier 29 was used by The Penn. R. R. Co. for the delivery of peaches, canteloupes and other perishable fruits (except watermelons) (Rec. 64-65) and was known as the peach market of New York (Rec. 72). Fruits delivered at this pier were unloaded by longshoremen employed by The Penn. R. R. Co. (Rec. 64). During the

strike the watermelon tracks at the second and Henderson Streets Yard were used by The Penn. R. R. Co. for the delivery of peaches and other fruits billed to Pier 29, to the exclusion of watermelons which were placed on its storage tracks in the Harsimus Cove Yard and in the Meadows Yard (Rec. 59). The watermelons rotted while they were being held by The Penn. R. R. Co. on the storage tracks (Rec. 51); they could have been delivered without delay if the other fruits billed to Pier 29 had not been placed on the watermelon tracks (Rec. 61, 93).

It was stipulated that Olivit Bros. was the lawful holder of the bills of lading (Rec. 116, par. 5). The bills of lading provided that the damages should be computed on the basis of the value of the property at the place and time of shipment including the freight charges if prepaid (Rec. 126, Ex. P-7). It was also stipulated that the value of the watermelons at the place and time of shipment was $13,465.00, and that Olivit Bros. sold them at the place of delivery for $8,895.00 which was the best price it could obtain for them owing to their damaged condition (Rec. 117, par. 9). It was further stipulated that the plaintiff paid to the defendant all the freight charges for transportation of these watermelons, amounting to $5,487.59 (Rec. 117, par. 10).

At the trial of the case in the Supreme Court of the State of New Jersey (Hudson Circuit) defendant's counsel moved for a direction of a verdict on the ground that the plaintiff had not affirmatively shown that the plaintiff was the owner of the property involved in the action, and on the further ground that no negligence was shown on the part of the defendant to charge it with liability for the damages to the watermelons (Rec. 93-96), and that the burden of showing negligence was on the plaintiff. This motion was denied and the trial judge then charged the jury that the burden was on the plaintiff to show that the defendant was negligent (Rec. 110-111) and that if the defendant was liable the plaintiff was entitled to recover the freight paid by it as a part of its

damages (Rec. 103, 113). The jury rendered a verdict in favor of the plaintiff for $11,613.05 (Rec. 31).

The Court of Errors and Appeals of the State of New Jersey, on appeal, 96 Atl. Rep. 588,589 held (Rec. 145, see Rec. 18-19 in the case of The Pennsylvania Railroad Company, Plaintiff in Error vs. Isaac W. Carr, *et al.*, No. 578, October Term, 1916, of this Court) that there was no merit in the contention made by the defendant, that the plaintiff had not proved ownership of the property in question because any lawful holder of a bill of lading issued by the initial carrier, pursuant to the Carmack Amendment (Sec. 20 of the Interstate Commerce Ace, as amended June 29th, 1906, C 3591; 34 U. S. Stat. at L. pp. 593, 595, par. 7), upon receiving property for Interstate transportation, may maintain an action for any loss, damage or injury to such property by any connecting carrier to whom the goods are delivered; and that it was expressly stipulated at the trial that the plaintiff was the lawful holder of the bills of lading. That Court said that there was evidence of a strike among the longshoremen of the water front of New York, which included the employees of the defendant company at the piers where freight of this kind was usually delivered. But the evidence also tended to show that these shipments were received by the initial carrier and by the defendant from the intermediate carrier, after the strike was over, and that the delay was caused by the use by the defendant company of the watermelon tracks at Second and Henderson Streets, during and following the strike, for the delivery of peaches usually delivered elsewhere to the exclusion of watermelons, which were placed on storage tracks at the "Meadows." It was therefore clearly a jury question, whether the delay was caused by the negligence of the defendant and the motion for a direction of verdict for defendant was properly refused. That Court further held that the plaintiff was entitled to recover the freight paid by it as a part of its damages because the bills of lading in question contained such a provision.

The questions involved are:

1. *Whether the plaintiff, as the lawful holder of the bills of lading, must affirmatively show, in order to maintain the action, that it was the owner of the watermelons in question at the time the shipments were made.*

This question was raised in the following manner:

After the case was at issue, the plaintiff and the defendant stipulated that bills of lading were issued by the initial carrier for the transportation of the watermelons and the plaintiff was the lawful holder of the bills of lading (Rec. 116, par. 5). Thereafter the defendant propounded interrogatories to ascertain the ownership of the property involved in the various shipments covered by the action (Rec. 19, 20). The Court, on motion of the plaintiff, struck out these interrogatories on the ground that they were immaterial (Rec. 20, 21). At the trial, defendant's counsel moved for a direction of a verdict in favor of the defendant on the ground that the plaintiff had not affirmatively shown that it was the owner of the watermelons at the time the shipments were made (Rec. 96). This motion was denied by the trial judge for the same reason that the interrogatories were stricken out (Rec. 97).

2. *Whether there was any evidence of negligence on the part of the defendant, which should have been submitted to the jury.*

This question was raised by defendant's counsel, on motion to direct a verdict in favor of the defendant (Rec. 93).

3. *Whether the plaintiff was entitled to recover the freight paid by it as a part of its damages.*

This question was raised by the defendant's counsel on exception to the Judge's charge to the jury (Rec. 114).

Specification of Errors

The errors assigned by the plaintiff in error are as follows (Rec. 4, 5, 6).

(1) Because the Court of Errors and Appeals of the State of New Jersey erred in affirming the refusal of the New Jersey Supreme Court upon the trial of the cause in the Hudson Circuit, at the close of the whole case, to direct a verdict in favor of the defendant and against the plaintiff.

(2) Because the said Court of Errors and Appeals erred in affirming the Order of the New Jersey Supreme Court, striking out the interrogatories submitted by defendant to plaintiff, dated March 19th, 1915, which were framed to ascertain the ownership of the property involved in the various shipments covered by the suit.

(3) Because the said Court of Errors and Appeals erred in affirming the ruling of the New Jersey Supreme Court, upon the trial at the Hudson Circuit, sustaining the objections of the plaintiff to the admission of evidence designed to show the ownership of the property involved in said shipments, and also in refusing to direct a verdict in favor of defendant because plaintiff had not shown ownership thereof.

(4) Because the said Court of Errors and Appeals erred in affirming the ruling of the New Jersey Supreme Court, upon the trial at the Hudson Circuit, on the motion to direct a verdict in favor of the defendant at the close of the whole case, after the defendant, the present plaintiff in error, had proved a strike, which was an excepted cause in the bills of lading relieving the defendant from liability except in cases of negligence, that the burden of proving absence of negligence of the defendant was upon the defendant, and remained there throughout the whole case.

(5) Because the said Court of Appeals erred in affirming the New Jersey Supreme Court upon the trial at the Hudson Circuit in ruling upon the motion to direct a verdict in favor of the defendant at the close of the whole case, that the burden of proving negligence of defendant did not rest upon the plaintiff after the defendant had proved a strike, which was an excepted cause in the bills of lading relieving it from liability except in case of negligence.

(6) Because the said Court of Errors and Appeals erred in affirming the New Jersey Supreme Court in refusing to rule upon the trial at the Hudson Circuit that, under all the facts of the case it was for the Court to determine, as a matter of law, that the defendant was not negligent, and was not liable to the plaintiff for any loss or damage occasioned by the holding back of the watermelons, having proved that the cause thereof was a strike, which, under a stipulation in the bills of lading covering the respective shipments, exempted the defendant from liability in such event, said bills of lading having been issued in accordance with the directions of the Act to Regulate Commerce, its amendments and supplements, and forming a contract between the parties by which their respective rights were to be determined, and in therefore refusing to direct a verdict in favor of the defendant.

(7) Because the burden was upon the plaintiff to establish negligence of defendant resulting in the loss or damage complained of, and the New Jersey Supreme Court at the trial at the Hudson Circuit, should have directed a verdict in favor of defendant at the close of the whole case, because plaintiff had failed to sustain that burden and there was not sufficient evidence of such negligence in the case to go to the jury, and that therefore, under the contracts between the parties, made in pursuance of the statutes of the United States, the defendant was not liable to plaintiff for such loss or damage; which said New Jersey Supreme Court refused to do, and which said

refusal was affirmed by said Court of Errors and Appeals.

(8) Because said Court of Errors and Appeals erred in affirming the ruling of the New Jersey Supreme Court, upon the trial at the Hudson Circuit, that the plaintiff, the present defendant in error, was entitled to recover as part of its damages in this suit, the amount of the freight charges which accrued upon the shipments in the action under the tariffs and schedules filed by the defendant, the present plaintiff in error, with the Interstate Commerce Commission, at Washington, D. C., in accordance with the provisions of the said Interstate Commerce Acts of Congress.

(9) Because the said Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, because there is no evidence of negligence of the defendant in the case proximately resulting in the loss or damage complained of, and judgment should have been given by said New Jersey Supreme Court in favor of the defendant and against the plaintiff, whereas judgment was rendered in said New Jersey Supreme Court in favor of the plaintiff and against the defendant, the present plaintiff in error.

Grounds of Motion to Dismiss Writ of Error and Affirm Judgment of the Court Below

1. No Federal questions appear in the record.
2. The Federal questions asserted are without merit.
3. The questions on which the decision of the cause depends are so frivolous as not to need further argument.

ARGUMENT

POINT I

The Writ of Error should be dismissed because no federal questions appear in the record.

The questions raised in the record and which are asserted by the plaintiff in error are as follows:

(1) *The plaintiff must affirmatively show, in order to maintains the action, that it was the owner of the watermelons in question at the time the shipments were made* (Rec. 96).

The plaintiff and the defendant stipulated:

> "Receipts or bills of lading were issued by the initial carrier for the transportation of the said watermelons, and the plaintiff was at the time of the bringing of this action and still is the *lawful holder* of the said receipts or bills of lading"

(Rec. 116, par. 5).

The Carmack Amendment (Sec. 20 of the Interstate Commerce Act as amended on June 29th, 1906, 34 U. S. Stat. at L. pp. 593, 595, par. 7), provides,

> "That any common carrier receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the *lawful holder* (our italics) thereof for any loss, damage or injury to such property caused by it. * * *"

The plaintiff and the defendant having expressly stipulated in the language of the Carmack Amendment that the plaintiff was the lawful holder of the bills of lading, no Federal question appears.

(2) *There was no evidence of negligence on the part of the defendant to be submitted to the jury* (Rec. 93).

That there was evidence of negligence to go to the jury, see Point II (A)3 *infra.*

The jury found, as a matter of fact, that there was evidence of negligence on the part of The Penn. R. R. Co., and this finding was affirmed by the Court of Errors and Appeals of the State of New Jersey (Rec. 145), 96 Atl. Rep., 588, 589.

The United States Supreme Court will not review this finding of fact.

Baltimore v Ohio RR Co. v. Whitacre 242 U.S. —

Hyde v. Booraem, 41 U. S., 169, 176.
United States Express Co. v. Ware, 87 U. S., 543, 545.
Miles v. United States, 103 U. S., 304, 313.
Dower v. Richards, 151 U. S., 658, 663, 668.
Israel v. Arthur, 152 U. S., 355, 362.
Bartlett v. Lockwood, 160 U. S., 368.
Egan v. Hart, 165 U. S., 186, 189.
Turner v. New York, 168 U. S., 90. 95.
Rhodes v. Iowa, 170 U. S., 412, 437.
New Orleans & N. E. R. Co. v. Nat'l Rice Mill. Co., 234 U. S., 80.
U. S. Comp. Stat. 1913, Vol. I, p. 700, Sec. 1672 (R. S. Sec. 1011).

In *Hyde v. Booraem, supra,* Mr. Justice Story, delivering the opinion of the Court, said:

> "We have no authority as an Appellate Court, upon a writ of error, to revise the evidence in the Court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision."

Chief Justice Waite, in *United States Express Co. v. Ware, supra,* said:

> "We see no error in the charge and cannot ex-

amine the evidence to ascertain whether the jury was justified in finding, as it did, upon the issues of fact."

In *Dower v. Richards, supra,* Mr. Justice Gray said:

> "The principal ground on which the plaintiffs seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the decision of the State Court, upon the question of fact is not within the jurisdiction of this Court * * *"
>
> "That this Court, in an action at law, at least, has no jurisdiction to review the decision of the highest Court of a state upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided * * *."

Mr. Justice White, speaking for the Court, in *Egan v. Hart, supra,* said:

> "The record before us contains all the testimony introduced and evidence offered in the Trial Court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a State Court, this Court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding."

In *Turner v. New York, supra,* Mr. Justice Gray said:

> "But the decision below that he was not in possession, involved no Federal question or any other question of law, but a mere inference of fact from the evidence which this Court is not authorized to review on writ of error."

Manifestly, under the above authorities, this Court will not review the evidence in the case at bar to deter-

mine whether the defendant was negligent. Obviously, no Federal question is presented.

(3) *The plaintiff was not entitled to recover the freight paid by it as a part of its damages* (Rec. 114).

The bills of lading provide:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee including the freight charges, if prepaid) at the place and time of shipment under this bill of lading * * *" (Rec. 126, Ex. P-7).

The plaintiff and the defendant stipulated:

> "The value of said watermelons at the place and time of shipment was $13,465.00" (Rec. 117, par. 9) and "The plaintiff, on delivery to it by the defendant of said watermelons, paid to the defendant all the freight charges for transportation of same, amounting to $5,484.59" (Rec. 117, par. 9).

These two amounts, which represented the cost of the watermelons to the plaintiff, were added together and the amounts received for the damaged watermelons was deducted therefrom, to arrive at the actual loss sustained by the plaintiff.

It is submitted that, in view of the provision of the bills of lading and stipulations, the plaintiff was entitled to the amount of the freight paid as a part of its damages, and therefore no Federal question appears.

The writ of error should be dismissed.

POINT II

The federal questions raised by the Assignment of Errors are without merit.

(1) *The 2nd and 3rd errors assigned are that the plaintiff should have shown ownership of the property*

involved in the various shipments in order to maintain the action (Rec. 4-5)

As pointed out in Point I (1) *supra,* it was stipulated between the plaintiff and the defendant that the plaintiff was the lawful holder of the bills of lading. Under the Carmack Amendment the defendant is liable to the lawful holder of the bills of lading for any loss, damage or injury to the property.

Mr. Justice Lurton, in *Adams Express Co. v. Croninger,* 226 U. S., 491, 506, says:

> "What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue for any loss, damage or injury to such property caused by it or by any connecting carrier to whom the goods are delivered."

In the case at bar, the Court of Errors and Appeals of the State of New Jersey, following *Adams Express Co. v. Croninger, supra,* said (Rec. 145) 96 Atl. Rep., 588, 589:

> "Any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack Amendment upon receiving property for interstate transportation may maintain an action for any loss, damage or injury to such property caused by any connecting carrier to whom the goods are delivered."

It is submitted that under the Carmack Amendment and the above stipulation the plaintiff's right to maintain the action cannot be questioned and the errors assigned, that the plaintiff must show ownership of the property, are without merit.

(2) *The 4th and 5th errors assigned are that the Court below ruled that the burden of proving negligence did not rest upon the plaintiff after the defendant had proved a strike which was an excepted cause in the bill of lading*

relieving it from liability except in case of negligence (Rec. 5).

The trial judge, upon the motion to direct a verdict in favor of the defendant did not rule that the burden was on the defendant to prove that it was free from negligence, but said (Rec. 95):

> "I suppose that he (counsel) would argue that inasmuch as I may decide that what actually did occur here was a strike, that that strike was not the proximate cause of the delay; that the proximate cause was the negligence of the railroad company in not getting other employees sufficient to handle the freight, or in not furnishing other facilities by way of tracks, or what not, which would enable them to dispose of both the peaches and the watermelons within a reasonable time, and he will say that your proof does not come to the measure of showing that the strike was the proximate cause but that it leaves open for the jury to say whether the proximate cause was the strike or the incapacity or lack of diligence of the defendant company * * *.
>
> "Mr. Hartpence: Perhaps we are pretty nearly on common ground upon the situation, if the Court please. Our real argument is that he has not done that. The burden is upon him to produce evidence upon that point.
>
> "The Court: He is not obliged to do it in case he thinks, and correctly thinks, that the case made by the defendant is not sufficiently strong to require it. If the case were what you would call air-tight, why manifestly he would have to come forward and do something or die; but the case in his judgment may not be of that character. He may say, 'Well, there is some evidence here, but there is plenty of ground for inference by the jury from the facts in the case to show that the real cause of the delay was the inactivity.'"

Furthermore, the trial judge charged the jury as requested by the defendant:

> "That if the delay was due to a strike which was an excepted cause in certain of the bills of lading introduced in evidence, and if no negligence on the defendant's part was shown, then the defendant is not liable as to those shipments; and the burden of proving such negligence is on the plaintiff (Rec. 110).

If there is any evidence of negligence which should have been submitted to the jury, it is immaterial whether the testimony came from the defendant's or the plaintiff's witnesses.

In *New Orleans & N. E. R. R. Co., et al. v. Nat'l Rice Milling Company*, 234 U. S., 80, 86, Mr. Justice Van Devanter said:

> "True, the testimony upon which the Court rested its conclusion that negligence was proved did not come from the plaintiff's witnesses, but from those for the carriers, and was largely elicited by cross-examination, but that is quite immaterial. The plaintiff was entitled to the benefit of all the testimony in the case from whatever source it came, and was not required, even though having the burden of proof, to go through the ceremony of proving any fact otherwise established."

(3) *The 6th, 7th, and 9th errors assigned are that the trial judge did not rule, as a matter of law, that there was no evidence of negligence on the part of the defendant* (Rec. 5-6).

The following acts and conduct of the defendant were in evidence:

(*a*) Diverting the peaches billed to Pier 29 to the Jersey City watermelon yard (Rec. 59, 60, 61, 89).

(*b*) Using of the watermelon tracks for the delivery of peaches to the exclusion of watermelons (Rec. 57, 59, 88).

(*c*) Preventing the delivery of the watermelons until

peaches and other fruits billed to Pier 29 had been delivered on the watermelon tracks (Rec. 61, 89).

(*d*) Holding the watermelons on the storage tracks until the peaches and other fruits billed to Pier 29 had been delivered on the watermelon tracks (Rec. 59, 93).

(*e*) Receiving, after the strike was over, peaches and other fruits billed to Pier 29 and delivering them on the watermelon tracks (Rec. 54, 63, 89, 114, Ex. P-1).

(*f*) Receiving, after the strike was over, watermelons billed to the Jersey City Delivery Yard which it knew it could not deliver without delay (Rec. 54, 63, 89, 114, Ex. P-1).

(*g*) Giving the consignees of peaches and other perishable fruits billed to Pier 29 preference in the use of the watermelons tracks (Rec. 59, 61, 88, 93).

(*h*) Destroying the watermelon market by delivering peaches and other fruits billed to Pier 29 on the watermelon tracks (Rec. 87, 89).

The Court of Errors and Appeals of the State of New Jersey said (Rec. 145) 96 Atl. Rep., 588, 589:

> "The evidence tended to show that these shipments were received by the initial carrier after the strike was over, and that the delay was caused by the use by the defendant company of the watermelon tracks at Second and Henderson Streets, during and following the strike, for the delivery of peaches, usually delivered elsewhere, to the exclusion of watermelons, which were placed on storage tracks at the 'Meadows.' It was therefore clearly a jury question whether the delay was caused by the negligence of the defendant; and the motion for a direction of verdict for defendant was properly refused."

Obviously, it was for the jury to say whether these acts and conduct of the defendant constituted negligence. The assertion of the defendant that there was no evidence of negligence on the part of the defendant to submit to the jury, is therefore without merit.

(4) *The 8th error assigned is that the plaintiff was not entitled to recover the freight paid by it as a part of its damages* (Rec. 5).

As pointed out under Point I (3) *supra,* the bills of lading provided that the amount of damages for which the defendant should be liable were to be computed on the basis of the value of the property at the place and time of shipment including the freight charges if prepaid. The value of the watermelons at the place and time of shipment and the sum paid for freight were stipulated.

The plaintiff's damages under these bills of lading were the value of the watermelons at the place and time of shipment, plus the freight paid by it, less the amount received by it at the point of destination for the damaged watermelons, which amounts were stipulated (Rec. 117). The Court of Erros and Appeals of the State of New Jersey held (Rec. 145) 96 Atl. Rep. 588, 589 that the plaintiff, under these bills of lading, was entitled to recover the freight paid by it as a part of its damages. Surely there is no merit in the defendant's assertion that the plaintiff was not entitled to the freight as a part of its damages, when the bills of lading expressly provided that the plaintiff was entitled to the freight.

The writ of error should be dismissed and the judgment below affirmed .

Respectfully submitted,

QUEEN & STOUT,
GEORGE S. HOBART,
Attorneys for Defendant in Error.

Edward P. Stout,
of Counsel.

Office Supreme Court, U. S.
FILED
DEC 10 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

No. 578

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error

vs.

ISAAC W. CARR and FANNIE G. ESTES,
Partners, doing Business as Isaac W. Carr & Co.

Motion to Dismiss Writ of Error Coupled with Motion to Affirm Judgment of Court Below

Brief for Defendant in Error Annexed

QUEEN A. STOUT
GEORGE S. HOBART
Attorneys for Defendant in Error.

EDWARD P. STOUT
Of Counsel.

THE ANSONIA PR. CO., Inc., 114-120 W. 41st St., N. Y.
Near 6th Ave. Elev. Station

IN THE

United States Supreme Court

OCTOBER TERM, 1916

No. 578

THE PENNSYLVANIA RAILROAD COMPANY
Plaintiff-in-Error,
vs.
ISAAC W. CARR and FANNIE G. ESTES, Partners doing business as Isaac W. Carr & Co.

Motion to Dismiss Writ of Error to Review a Judgment of the Supreme Court of the State of New Jersey Coupled With a Motion to Affirm the Judgment of the Court Below

Now come Isaac W. Carr and Fannie G. Estes, partners doing business as Isaac W. Carr & Co., the defendants-in-error, by George S. Hobart and Edward P. Stout, their counsel, and move this Court to dismiss and quash the paper purporting to be a writ of error for want of jurisdiction because no Federal questions appear in the record, as pointed out in the annexed argument; and the said defendants-in-error also move this Court to affirm the judgment of the Supreme Court of the State of New Jersey, upon the ground that it is manifest that

the Federal questions asserted by the plaintiff-in-error are without merit and that the questions upon which it is claimed that the jurisdiction depends are so frivolous as not to need further argument.

QUEEN & STOUT,
GEORGE S. HOBART,
Attorneys for Defendants-in-Error.

Edward P. Stout,
Of Counsel.

Notice of Submission of Said Motions to Dismiss and to Affirm

To Albert C. Wall, Esq., Attorney for Plaintiff-in-Error, 1 Exchange Place, Jersey City, N. J.

SIR:

PLEASE TAKE NOTICE, that on the record herein, we shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, January eighth, Nineteen Hundred and Seventeen, at the Capitol in the City of Washington, in the District of Columbia, at the opening of the Court on that day, or as soon thereafter as counsel be heard, the motions of which the foregoing are copies; and we shall submit with said motions and in support of the same the argument hereto annexed.

Yours respectfully,

QUEEN & STOUT,
15 Exchange Place, Jersey City, N. J.

GEORGE S. HOBART,
243 Washington Street, Jersey City, N. J.
Attorneys for Defendants-in-Error.

George S. Hobart,
Edward P. Stout,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 578

THE PENNSYLVANIA RAILROAD COMPANY
Plaintiff-in-Error,
vs.
ISAAC W. CARR and FANNIE G. ESTES, Partners doing business as Isaac W. Carr & Co.

Brief For Defendants in Error

Motion to dismiss writ of error to review a judgment of the Supreme Court of the State of New Jersey, coupled with a motion to affirm the judgment of the Court below.

The questions involved on these motions are the same as those in the case of The Pennsylvania Railroad Company, plaintiff-in-error vs. Olivit Brothers, No. 577, October Term, 1916, of this Court, and this case is submitted on the brief in that case.

The writ of error should be dismissed and the judgment below affirmed.

Respectfully submitted,

QUEEN & STOUT,
GEORGE S. HOBART,
Attorneys for Defendants-in-Error.

Edward P. Stout,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 577.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OLIVIT BROTHERS, A CORPORATION.

No. 578.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ISAAC W. CARR AND FANNIE G. ESTES, PARTNERS, DOING BUSINESS AS ISSAC W. CARR & CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR ON THE MERITS.

Please Notice.

The transcript of record in case number 577 covers the pleadings, stipulations, testimony, and record entries in six (6) separate cases which were consolidated and tried together to the same jury.

In each of the six (6) cases the verdict and judgment of the trial court was in favor of the respective plaintiffs and against the defendant The Pennsylvania Railroad Company. On appeal to the New Jersey Court of Errors and Appeals the judgments in five (5) of the cases were reversed for errors of law. In the remaining case, namely, Olivit Brothers, a corporation, against The Pennsylvania Railroad Company, frequently referred to as the "64-count case," the judgment was affirmed and is here on assignments of error appearing at pages 4, 5, and 6 of the printed transcript.

Notwithstanding much of the irrelevant matter was omitted in printing, the transcript before the court yet contains much that is not only irrelevant or unnecessary to the due appreciation of the matters open for discussion here, but the whole is so arranged that confusion may result even from the most careful examination of its contents.

As tending to simplification, we would say that the following pages of the printed transcript may be disregarded either in whole or in part, as here indicated, viz:

All of pages 12 and 13 and the first half of page 14; the second half of pages 18 and 21 and all of pages 22 to 26, inclusive; the first half of page 27; the second half of page 31; all of pages 32 to 44, inclusive; the first half of page 46; much of page 47; the second half of page 48; all of pages 49 and 50 and the first three-quarters of page 51; the last half of page 97 and all of pages 98 to 100, inclusive;

all of pages 102 and 103 and the first half of page 104; and all of pages 118 to 144, inclusive, with all exhibits intervening or appearing between same except the bill of lading opposite page 126, marked at top "208, Exhibit P-7."

Being thus reduced, a helpful index of the remaining and pertinent parts of the transcript of the record would read as follows, to wit:

CASE NO. 577.

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Statement of Case.

Plaintiffs, Olivit Brothers, a corporation, and Carr & Co., sued defendant, a common carrier, for failure to transport carefully and within reasonable time certain carloads of watermelons consigned to them respectively for delivery at Jersey City, New Jersey, by reason whereof "a large number of said watermelons was wholly lost to the plaintiff and the remainder was delivered * * * at Jersey City in a bad and damaged condition" (Rec., 28).

Defendant answered by saying that the transportation in question had taken place under the terms of a bill of lading issued to plaintiffs by the initial carrier, pursuant to the provisions of the act of Congress commonly called the Act to Regulate Commerce, whereby in express terms defendant was to be relieved from liability for all damages to said goods and property resulting from delay in transportation and delivery thereof, when

"caused by a strike or strikes among defendant's employees," further asserting that a strike did take place among its employees which continued from the 9th day of July to the 21st day of July, 1912, which strike was the cause of the alleged delay; and that said transportation had taken place under the terms of a bill of lading by which it was expressly agreed that the defendant should be relieved from all liability for damage to goods and property resulting from or occasioned by an accumulation (congestion) of freight at any points, or to any other causes over which the defendant had no control; averring that an accumulation of freight had occurred at Jersey City, New Jersey, which continued from the 9th day of July to the 15th day of August, 1912, over which accumulation (congestion) the defendant had no control, and same was the cause of the alleged delay resulting in the damage complained of (Rec., 15-16).

Plaintiffs replied by denying the truth of the matter set up by way of defense (Rec., 17).

In Olivit Brothers case (No. 577) the carloads of melons, some sixty-four in number, originated at various points on the Atlantic Coast Line Railroad Company in the State of North Carolina.

In the Carr & Co. case (No. 578) the carloads of melons, some seven in number, originated at various points in the State of Georgia.

All cars were delivered to the defendant Penn-

sylvania Railroad Company at Edgemoor, a connecting point in the State of Delaware, and all were consigned for delivery to the respective plaintiffs named, at Jersey City, in New Jersey.

In the first case (No. 577) shipments moved from points of origin between July 18th and August 8th. They were received by the defendant, the Pennsylvania Railroad, at Edgemoor, the transfer or connecting point, between July 21st and August 11th. All were delivered at the delivery yards, Second and Henderson streets (sometimes called the "ball grounds") between July 26th and August 15th.

In the second case the shipments left points of origin between July 16th and July 25th. They were received by the defendants at Edgemoor between July 17th and July 30th. They were delivered at Second and Henderson streets, Jersey City, New Jersey, between July 23rd and August 3rd.

At the trial it was stipulated (Rec., 116) that the shipments in question were made under bills of lading issued by the initial carrier; that the defendants transported the freight by freight trains from Edgemoor, Delaware, to Jersey City, at and in the times shown in an accompanying chart and above indicated; that during the months of July and August, 1912, the customary time for transporting such freight between Edgemoor and the "ball grounds" (Second and Henderson

streets) delivery yard "was about seven hours under the most favorable circumstances" (It appears from an inspection of said chart that in the instances under consideration the movements occupied from three or four days); that the watermelons were in apparent good order when received by the defendant at Edgemoor, Delaware, and were in damaged condition when delivered to the respective plaintiffs at Jersey City, New Jersey; that all of the shipments were interstate shipments subject to the provisions of the carriers' bill of lading at the regular or reduced rate specified in tariffs filed with the Interstate Commerce Commission and subject also to rule one of the Southern Classification filed with said Commission (Rec., 116, 117).

Rule I of Southern Classification above referred to reads as follows:

> "The reduced rates specified in this classification will apply only on property shipped subject to the conditions of the carriers' bill of lading. Property carried not subject to the conditions of the carriers' bill of lading will be at the carriers' liability, limited only as provided by common law and by the laws of the United States and of the several States, in so far as they apply. Property thus carried will be charged 10 per cent higher, subject to a minimum increase of 1 per cent per hundred pounds than if shipped subject to the conditions of the carriers' bill of lading" (Rec., 52).

The bill of lading (see Exhibit P-7, opposite page 126) contained the following:

> "Received, subject to the classifications and tariffs in effect * * * the property described below * * * subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns."

On the back of said bill of lading appears the following:

> "Conditions— * * * Except in case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring * * * or resulting from * * * riot or strike; * * *
>
> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value is represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based."

Plaintiff having offered in evidence (Rec., 46) the stipulation above referred to, and (Rec., 47) the bill of lading also above referred to, and having read to the jury Rule I of the Southern Classification (Rec., 52), and having requested the court

(Rec., 51) to note "on the record that the damage that we are claiming in all of these suits is the damage caused by the (decay due to) delay in the transportation of the watermelons while they were in the possession of the defendant company, due to (decay due to) delay, and not to any other cause," rested (Rec., 52).

Defendant thereupon submitted testimony tending to prove that its tracks led from the Meadows easterly to the Harsimus Cove yard, its terminal on the west bank of the Hudson River in Jersey City; that the "Meadows" is a freight storage yard about five miles west from the Hudson River (Rec., 74 and 75; Exhibit D-1, p. 144). At the time of the strike which originated early in July on certain steamship piers and which on July 8 or 9 broke out on defendant's Piers 27, 28, and 29, in New York City, where it continued to be active until July 18th or 21st (Rec., 63, 66), watermelons were necessarily delivered in that part of the terminal at Jersey City known as Second and Henderson street or "ball ground" yard, wherein certain tracks were known as a "sort of a market place * * * for the watermelons," a watermelon market for New York City and vicinity (Rec., 62). Peaches and other highly perishable freight consigned to Piers 27, 28 and 29, New York City, were carried over the same route from Meadows to Harsimus Cove yard, whence they were lightered, or floated, across the river to New York City (Rec., 85).

The congestion following the strike existed from July 10th to about September 1st (Rec., 55, 56, 59, 60, 61). Peaches and other highly perishable freight consigned to New York (Piers 27, 28, 29) were stopped in the Harsimus Cove yard because of inability of the defendant to carry same for delivery beyond, and defendant was obliged to make deliveries thereof in Jersey City during the night-time and early morning from tracks usually used during the season for the delivery of watermelons during the morning and daytime (Rec., 62, 63).

During the period of congestion "watermelons were delivered in the day and the peaches were delivered at night, and everything got blocked, congested, that is watermelons could not get in fast enough, * * * They were blocked up several places along the road, in the storage yard; they took their turn to come down to the 'ball ground'." All the cars enumerated in the schedule attached to Exhibit P-1, being all the cars involved in these suits, were affected and handled in the way above stated (Rec., 53).

The whole congestion was due to the fact that peaches and other highly perishable freight consigned to Pier 29, New York City, were necessarily delivered at the Jersey City terminus, and the congestion, thus resulting from the strike on Pier 29, caused the delay in the delivery of the watermelons involved in these cases, and resulted in the damages complained of (Rec., pp. 53-61, 86-92).

(Rec., p. 57:)

Q. Did these cars of peaches and other cars which were on the watermelon tracks prevent the delivery of the watermelons?

A. In some cases, yes, sir.

Q. And wasn't the whole congestion due to the fact that commodities which were billed to Pier 29 were during the period of this congestion brought to the Second and Henderson street yard; wasn't that the cause of the congestion?

(Rec., p. 58:)

A. What do you mean; what commodities?

Q. Commodities which were billed to Pier 29.

A. Only peaches.

Q. And so work down to the result that the commodities which were billed to Pier 29, being brought to the Second and Henderson street yard, brought about this congestion?

A. Yes, sir.

* * * * * * *

(Rec., p. 59:)

Q. When you say "back up" what do you mean by that?

A. I mean we had to take care of more perishable freight first, which consisted principally of canteloupes and peaches, and the watermelons finally backed up until——

Q. When you use the term "backed up" what do you mean by that; backed up where?

A. I mean we had more of the highly perishable than we could handle with our watermelons.

Q. And what became of the watermelons?

A. They were put on storage tracks in Harsimus Cove yard and in the Meadows.

Q. Is that what you mean by backing them up?

A. Yes, sir.

Q. You mean they were held back from the delivery tracks?

A. That is exactly what I mean, yes, sir.

Cross-examination:

Q. And you say that the congestion in the ball ground, or the delivery yard at Second and Henderson street, was due to the fact that peaches and other commodities billed to Pier 29, New York City, were delivered at Second and Henderson street during this congestion?

A. Yes, sir.

* * * * * * *

(Rec., 60:)

Q. So the peaches and canteloupes billed to Pier 29 being delivered at Second and Henderson street, brought about this congestion—peaches and canteloupes?

A. That was largely responsible for the condition, yes, sir.

(Rec., 61:)

Q. The cause of this congestion was due to the bringing to the Second and Henderson street yard of peaches and canteloupes which were billed to Pier 29?

A. Yes, that is what started the congestion.

Q. The delivery yard at Second and Henderson street has certain tracks known as the watermelon tracks during the water-

melon season, isn't that so? Tracks where you deliver watermelons?

A. Tracks that we deliver watermelons from, yes, sir.

Q. During the period of this strike, or congestion, rather, peaches that were billed to Pier 29 were put on those watermelon tracks?

A. They were during the night.

Q. Yes, but you did not always get them out in time to get the watermelons in in the morning, did you?

A. Well, that was impossible to do that.

Q. Yes, sometimes it was ten o'clock in the morning before you got them pulled out of the way?

A. On a few occasions, yes.

Q. And under normal conditions watermelons are put on these tracks ready for delivery about seven o'clock in the morning; isn't that so?

A. Yes.

In rebuttal plaintiff proved (Rec., 92) that they "delivered other stuff, put other stuff on the tracks and delivered that"; "peaches and stuff like that —vegetables."

Q. What effect did the placing of peaches on these tracks have upon the watermelon market there?

A. After they cleaned those cars out they took those cars out and brought ours back again that they took out during the night, they would bring them back about nine or ten in the morning.

Q. That delayed the delivery of your cars?

A. Certainly.

In surrebuttal defendant's witness Plant testified (Rec., pp. 92-93) that when the peaches were held back from Pier 29 that

> *"The yard known as the Henderson street yard and the private sidings leading therefrom were the only available points that we had where we could deliver them. Not only the Henderson street yard, but also the private sidings were used to the extent of the sidings to deliver peaches on.* * * *"* (Italics ours.)
>
> (Rec., 93.) Peaches are "highly perishable."
>
> The Court: I guess we will all admit that, won't we?
>
> Mr. Stout: Yes.

Both sides having rested, defendant moved the court to direct verdicts in its favor on the ground (Rec., 95) that having proved the happening of an excepting cause or causes under the bill of lading, "which was the proximate cause of the delay (and resulting damage) complained of," the plaintiff had failed to go forward with his proof to the extent necessary to show actionable negligence on part of defendant in the handling of the excepting cause or causes. Paraphrasing the words used by counsel for defendant when making such motion to the trial court (Rec., 94), the basis for the motion was that as defendant had brought itself within the protection of the stipulations of the bill of lading, it was incumbent upon the plaintiff, still hoping to recover, to show that in one way or another defendant had failed "to handle the situa-

tion at that time in a way that was free from negligence; in other words, it shifts the whole issue" * * * and the question then is whether in face of the excepting cause defendant did what it should have done to meet the situation; and the burden is upon the plaintiff to show that defendant did not do what it ought to have done (Rec., 94).

The court overruled this motion after a somewhat elaborate oral discussion of it, in the light of numerous suppositious arguments which it suggested might be made (but seemingly were not) by plaintiff; all of which suppositious arguments, from the standpoint of the defendant who relied and insisted upon the total absence of any and all evidence tending to support any one of them, were mere abstractions (Rec., pp. 94-97).

As stated by counsel for defendant (Mr. Hartpence) in reply to the court's suggestions as to the possibilities of plaintiff's contentions, "Our real argument is that he has not done that. The burden is upon him (plaintiff) to produce evidence upon that point" (Rec., 96).

The refusal of the trial judge so to instruct the jury was made one of the principal grounds of appeal to the New Jersey Court of Errors and Appeals (Rec., 9), and the action of that court in upholding same, notwithstanding defendant's insistence that there was no evidence of negligence on the part of defendant, which should have been submitted to the jury, is among the errors assigned here (Rec., 5).

At the conclusion of the colloquy, and after the action of the trial judge in overruling the motion in question, the trial court was adjourned for the day (Rec., 101). Upon reconvening the next morning, the learned trial judge, without referring to the action of the previous day, immediately entered upon his instructions to the jury. First carefully reviewing and correctly stating the purport of the pleadings as filed and the issues raised thereby, and the contentions of the respective parties concerning the same (Rec., 105, 106), and declaring that "these suits are rested upon bills of lading, and those bills of lading are the contracts between the parties in the case, and the case is grounded upon what is popularly called the Carmack Amendment," he proceeded to instruct the jurors respecting the effect of the Carmack Amendment and the general duties of a carrier transporting goods under the terms of a bill of lading issued pursuant to its terms, as to the exercise by it of reasonable care and diligence (Rec., 106-108); further instructing specifically as follows:

> "You will have observed that I said a few moments ago that the defendant could excuse itself by showing that it came within one of the exceptions stated in the bill of lading, either that there was a strike accompanied by violence which interrupted the due and ordinary and usual course of its business, or that there was a congestion due to causes beyond its control, or that the claims were not filed within the time limited

in the bill of lading for the filing of them. Now, those, gentlemen, are defenses, and the burden of establishing the existence of those defenses rests upon the defendant, and the defendant is obliged to make them out by the greater weight of the evidence. If the defendant shall make out by the greater weight of the evidence that there was a strike and the strike was the cause of the congestion of the freight which resulted, if it did result, in the delay in the delivery and the consequent decay of the produce, why manifestly the defendant would excuse itself on that ground, unless the plaintiff then took up the burden and showed by the greater weight of the evidence that even though there was a strike the defendant in the handling of the strike, or in the handling of the produce, or in dealing with the situation, did not use reasonable care to deliver the goods within a reasonable time to the consignee. If the plaintiff makes that out by the greater weight of the evidence that amounts to what is known in the law as negligence, and the negligence would render, if that is established by the plaintiff by the greater weight of the evidence, the defendant responsible notwithstanding the fact of the strike. Now when I said that the burden of establishing the negligence rested upon the plaintiff I did not necessarily mean that the plaintiff is obliged after the defendant gets through with its evidence to put more evidence in, because the burden upon the plaintiff is upon the whole evidence to make the evidence weigh heavier in favor of the negligenec of the defendant with respect to the delay in delivery than it does the other

way. If the evidence does weigh heavier in favor of the negligence of the defendant company than it does in favor of the freedom from negligence of the defendant company, why then of course the plaintiff was under no obligation to offer any further proof, because then the evidence would preponderate in that particular and the plaintiff might very well rest at that point without putting in any further proof on that ground. But the burden rests upon the plaintiff to establish the negligence by the greater weight of the evidence. If the plaintiff has thus established it the plaintiff is entitled to recover upon the ground of negligence. If it has not it is not.

"Now the same rule applies with respect to the congestion of the freight due to causes beyond the control of the defendant. The defendant is obliged to make out the fact of the congestion as an excuse by the greater weight of the evidence. If the defendant thus makes out the fact of the congestion and its operation as a cause in the delay and consequent decay of the fruit, why then the plaintiff is obliged to bear the burden of establishing by the greater weight of the evidence that that congestion and the consequent delay was due to the negligence of the defendant; and the remarks that I made with respect to the other defence apply equally to this. The plaintiff does not have to go on and introduce proof after the defendant gets through with its proof, *if already there is evidence in the case—and whether there is or not I do not say; I leave that for you to determine*—if already there is evidence in the case preponderating in favor of the negligence of the defendant in

that particular as against its freedom from negligence (Rec., 108, 109).

* * * * * * *

"I have been requested by the defendant to charge certain requests and I am going to charge them, and they are these:

"1. That if the delay was due to a strike which was an excepted cause in certain of the bills of lading introduced in evidence, and if no negligence on the defendant's part was shown, then the defendant is not liable as to those shipments, and the burden of proving such negligence is on the plaintiff.

"2. That if the delay was due to any cause beyond the defendant's control and therefore within the exception in certain of the bills of lading introduced in evidence, if no negligence of the defendant was shown, then the defendant is not liable as to those shipments, and the burden of proving such negligence is on the plaintiff.

"You will have observed from what I have already read and from what I read later that many of these are things that I have already told you, but I go over them for abundant caution in getting the rules accurately before you.

"3. That the strike was a matter beyond the control of the defendant and therefore an excepted cause in certain of the bills of lading introduced in evidence. If reasonable care was exercised to relieve the situation the defendant is not liable as to those shipments.

"4. That if the delay complained of was occasioned by accumulation of freight at any point and therefore within the exception in certain of the bills of lading intro-

duced in evidence, and if no negligence of the defendant was shown, then the defendant was not liable as to those shipments, and the burden of proving such negligence is upon the plaintiff.

"5. Negligence is not to be presumed against the defendant but must be proved affirmatively, and the plaintiff has the burden of so proving it." (Rec., 110.)

* * * * * * *

"12. If the delay which caused the decay and damage of the watermelons was due to the excepted cause or causes respectively in the bills of lading marked in evidence, then the burden is upon the plaintiff to show that such delay could have been avoided by the defendant by the exercise of reasonable care, and the burden is on the plaintiff to show affirmatively that the damage was the result of the negligence of the defendant.

"13. The defendant proved a cause beyond its control, a strike, an accumulation of freight at a point affecting all of the shipments involved in these suits, which brings the delay causing the damage within the excepted causes in the bills of lading respectively, and it was incumbent upon the plaintiff at that point in the case to show negligence on the part of the defendant, and the burden of proof was upon the plaintiff to establish such negligence without further proof by the defendant.

"Now you will observe that I said that the defendant did prove a cause beyond its control, a strike. I have no doubt in this case, gentlemen, that what actually happened over in New York was a strike, and I have no doubt that that strike was at the

time it was in existence beyond the control of this defendant and that this defendant was not responsible for the acts of these strikers. The contention of the plaintiff as I understand it is not that there was no strike or that the defendants could have then and there ended that strike. The contention of the plaintiff is that the defendant did not use that reasonable care which it should have used with respect to the particular shipments in these cases and that its neglect to use that care was the proximate cause of the injury and therefore entitled the plaintiff to recover. But as I say, there is no doubt that this was a strike and that such strike does not render the defendant liable for its result unless the defendant was negligent, unless it did not use reasonable care in the forwarding and the delivery of this freight, these watermelons. Now as bearing upon that question of a strike, and the law with respect to that, there seems to me to be no manner of doubt either in reason or on the cases. These men who went out on strike were some of them the employees of this defendant and there were disorderly disturbances and there were arrests, as the evidence here shows, and there was some intimidation and some coercion" (R., 111, 112).

* * * * * * *

"That states the obvious rule of sense and of law; and that is not a question that is in serious dispute in this case, as to whether what actually happened over there, with the accompanying violence, was a strike. *The question is whether or not in the light of what occurred over there the*

defendant in this case has been shown by the greater weight of the evidence to have been negligent in the forwarding and the delivery of this freight. If it has been, why these plaintiffs are entitled to recover and to have you assess their damages, unless some of these other defenses have been made out by the greater weight of the evidence. If the defendant has not been shown to have been negligent in the particular indicated, why then manifestly the defendant is not responsible and the verdict in all the cases where these rules apply would have to be for the defendant" (R., 112).

To the charge itself so formulated, which considered as an abstraction correctly states the law of the matter and accords in points of law with various specific prayers for instructions submitted on behalf of the defendant (the propositions of law so given being identical with those which on the preceding day the learned trial judge had negatived *arguendo*), no exceptions were taken by either side. The position and reliance of the plaintiff in error, defendant below, with respect to all thereof was that there was no evidence by or on behalf of either party to the cause from which, under such instructions, the jury could in logic and good conscience find, as it improperly did find, in favor of the plaintiff.

Of course, in the absence of any such evidence the motion to instruct for the defendant should have been granted.

That the learned trial judge himself was at

least doubtful as to the existence in the case of any such evidence plainly appears from the body of the charge wherein, among other things, he said (R., 109, middle):

> "The plaintiff does not have to go on and introduce proof after the defendant gets through with its proof, if already there is evidence in the case (presumably to support plaintiff's contentions, a proposition that could not well be gainsaid)—*and whether there is or not I do not say; I leave that for you to determine*—if already there is evidence in the case preponderating in favor of the negligence of the defendant in that particular as against its freedom from negligence." (Italics ours.)

Plaintiff in error respectfully contended on appeal to the New Jersey Court of Errors and Appeal, and respectfully reiterates here that unless a perusal of the evidence discloses the existence of some evidence "in the case preponderating in favor of the negligence of the defendant in that particular as against its freedom from negligence," it was plain error, affording appropriate and compelling ground for reversal by this court of the judgments complained of, notwithstanding the concurring judgments of the two State tribunals, for the trial judge to have permitted the jury to determine for itself the matter of law which necessarily inhered in the inquiry as to whether in truth the record presented any sufficient evidence from which to infer actionable negligence on the

part of defendant; the existence of exempting causes specified in the bill of lading, which constitutes the contract and the measure of obligation between the parties having concededly been made out.

On appeal to the New Jersey Court of Errors and Appeals, the judgment of the Supreme Court of New Jersey in each case was ordered affirmed (R., No. 578, p. 20), the pertinent portions of the opinion of the appellate tribunal being as follows:

> "This action was brought to recover damages for deterioration in condition of seven carloads of watermelons consigned from points in Georgia and South Carolina to the plaintiffs in Jersey City; the deterioration being averred to have resulted from unnecessary delay in transportation.
>
> "The defendant company received each of these carloads in good condition from an intermediate carrier at Edgemoor, Delaware, and within a reasonable time after shipment by the initial carriers. Their point of destination was the defendant company's delivery yard at Second and Henderson streets, Jersey City. The usual and customary time for transportation of watermelons from Edgemoor, Delaware, to the point of destination, was seven hours. The delay in the present case occurred between these points and at a point on the 'meadows' several miles west of their destination. When after a delay of four days the melons were delivered to the plaintiffs at the point of destination, they were in a damaged condition due to such delay.

"The jury, at the Hudson Circuit, found for the plaintiffs and the defendant company appeals from the consequent judgment.

"We are of the opinion that the judgment must be affirmed.

"It is contended that the trial judge erred in refusing to direct a verdict for the defendant company. We think not.

* * * * * * *

"In the case at bar each of the initial carriers of the carloads of melons in question executed and delivered to the plaintiffs, or their representatives, bills of lading therefor, and at the trial it was expressly stipulated that the plaintiffs were the lawful holders thereof.

"The next reason urged why a verdict should have been directed is that 'no negligence had been shown on the part of the defendant.'

"At the trial the defendant company sought to relieve itself from liability because the bills of lading for these shipments contain a condition that the carrier, except in case of negligence, shall not be liable for damage to property resulting from delay in transportation if such delay is caused by a strike. There was evidence of a strike among the longshoremen of the water front of New York which included the employees of the defendant company at the piers where fruit of this kind was usually delivered. But the evidence also tended to show that these shipments were received by the initial carrier, and by the defendant from the intermediate carrier, after the strike was over, and that the delay was caused by the use

by the defendant company of the watermelon tracks at Second and Henderson streets, during and following the strike, for the delivery of peaches, usually delivered elsewhere, to the exclusion of watermelons which were placed on storage tracks at the 'meadows.' It was therefore clearly a jury question whether the delay was caused by the negligence of the defendant, and the motion for a direction of verdict for defendant was properly refused" (R., No. 578, pp. 18, 19).

Assignments of Error.

Plaintiff in error relies upon all of the errors formally assigned at pages 4 to 6, inclusive, of both printed transcripts of record.

Those assignments of error may be more succinctly stated as follows:

1. Error of the trial court, affirmed by the New Jersey Court of Errors and Appeals, in overruling plaintiff in error's motion to instruct the jury to return its verdict for defendant for want of any sufficient evidence of actionable negligence on its part to go to the jury.

2. Error of the trial court, affirmed by the Court of Errors and Appeals, in refusing to admit evidence tending to show that plaintiffs were not in fact the owners of the watermelons involved in the various shipments, notwithstanding, they were the lawful holders of the bills of lading under which the shipments moved, this for the purpose of showing that plaintiffs had not in fact suffered

any damage by reason of the delay and consequent decay.

3. Error of the trial court, affirmed by the Court of Errors and Appeals, in holding that plaintiffs might recover as an element of damages freights which had not been "prepaid," but which had been paid on and at the time of the delivery to and acceptance by plaintiffs of the various shipments.

ARGUMENT.

It will be recalled that upon the trial of the case counsel for plaintiffs, to emphasize plaintiffs' position, desired "to have noted on the record that the damage we are claiming * * * is the damage caused by the (decay due to) delay in the transportation of the watermelons, while they were in the possession of the defendant company" (R., 51), thus, in view of the defenses set up in defendant's answer and the issues of law made thereby, advisedly differentiating between the liability of the defendant due to negligence in transportation as such, and any liability which might be ascribed to its failures or derelictions in the reasonable and necessary handling of the strike and its resulting congestions, both of which subsequently were urged as exempting causes, and each of which, until overborne by opposing evidence, were by the learned trial judge conceded to constitute valid and sufficient defenses in bar of plaintiffs' claim.

The suggestions of the Court of Errors and Ap-

peals that the evidence "tended to show that these shipments were received by the initial carrier and by the defendant from the intermediate carrier, after the strike was over, and that the delay was caused by the use by defendant company of the watermelon tracks at Second and Henderson streets, during and following the strike, for the delivery of peaches, usually delivered elsewhere, to the exclusion of watermelons, which were placed on storage tracks at the 'meadows,'" even if well founded in the evidence itself, may well be questioned on the score of competency to support a deduction of negligence in the handling of the situation which directly attended and enveloped the exempting causes.

In the first place it should be noted that while the strike period itself extended from July 8th or 9th to July 18th or 21st (R., 63, 66), the consequent congestion, which was the direct, and, from the nature of the business, the inseparable, result of the strike proper, continued until about September 1st (R., 55, 56, 59, 60, 61). As remarked by the learned trial judge in the course of the trial (R., 86), "the strike was the cause of the congestion and the congestion was the cause of the delay; that is their (defendants') case." He might well have added that the damages due to the decay resulted from the delay caused by the congestion, which was the direct and necessary concomitant of the strike itself. The evidence to this effect is both convincing and undisputed.

In this connection it also should be noted that in the Olivit Brothers case, while all the shipments counted upon were delivered to defendant at Edgemoor between July 21st and August 11th, the congestion was rife from July 10th to approximately September 1st, while all of the said shipments were delivered at Second and Henderson streets between July 25th and August 15th, and it has not been made to appear from any evidence in the case that by the exercise of reasonable diligence or more skillful maneuvers they or any of them could have been placed for delivery a single hour earlier than was done. The same may be said of the shipments in the Carr & Company case, which moved from initial points between July 16th and 25th, arrived at Edgemoor between July 19th and 30th and were delivered at Second and Henderson streets between July 23d and August 3d (R., No. 578, p. 16).

So with respect to the suggested use in the circumstances "of the watermelon tracks at Second and Henderson streets, during and following the strike, for the delivery of peaches, usually delivered elsewhere, to the exclusion of watermelons, which were placed on storage tracks at the meadows," it should at once be said that the evidence, fairly scanned and stated, does not justify the inference or deduction that the watermelon tracks were used for the delivery of peaches to the EXCLUSION of watermelons. The most that can reasonably be deduced along that line is that during

the strike and ensuing period of congestion peaches consigned to Pier 29, which because of the strike and congestion could not be delivered there, were during the night-time and early morning hour delivered from the watermelons tracks, thus delaying the placing of the watermelons cars until sometime between nine o'clock in the morning and two o'clock in the afternoon (R., 90, 91). But conceding this, no presumption of negligence as matter of law can be spelled out of the circumstance, for while the tracks in question were called or referred to as "watermelon tracks" or "a watermelon market," the record is barren of any testimony tending to show that the tracks were dedicated to the exclusive handling of watermelon shipments, or that during the watermelon season as at other times they were not used as and when circumstances required for the handling of other traffic. It is a truism to say that it is both the privilege and the duy of a common carrier by railroad to make the most efficient use of its facilities which circumstances will permit, and in the absence of some evidence tending to establish an agreement either express or implied inuring to the benefit of the plaintiffs in the instant suits to the effect that the tracks in question should be dedicated to the watermelon traffic exclusively, it would seem to unusually extend the doctrine of intendments in support of verdicts of juries, to the suggest that in the absence of any competent evidence or even an instruction from the trial judge to such effect, the jury might

have found the existence of actionable negligence and consequent liability on the part of the carrier (defendant) from the circumstance that when deprived by the strike, over which it had no immediate control, of so much of its facilities as were customarily allotted to the peach traffic, it had temporarily made use of the so-called "watermelon tracks" for the delivery of both watermelons and peaches, although in so doing it interfered as little as possible with the watermelon use by placing and unloading the peaches at night.

With due deference to the established principles of logic and in the light of the entire sum of human experience, if such be available, how can it reasonably be said that the added use temporarily made of the Second and Henderson streets yard by delivering there certain carloads of peaches, which, because of the strike could not reach their customary destination, in the absence of special contract, would give rise to and support an inference of actionable negligence against the carrier and in favor of the shippers of a competitive commodity?

Nor can these suggestions of the Court of Errors and Appeals be made to jibe with the express instruction of the trial judge to the jury, namely:

(R., 110:)

> "5. Negligence is not to be presumed against the defendant, but must be proved affirmatively, and the plaintiff has the burden of so proving it."

(R., 111:)

"7. That the burden is on the plaintiff to show that the decay and damage to the watermelons would not have resulted if the defendant had not failed to exercise reasonable care to avoid such result upon the occurrence of the excepted causes in the bills of lading marked in evidence respectively."

"12. If the delay which caused the decay and damage of the watermelons was due to the excepted cause or causes respectively in the bills of lading marked in evidence, then the burden is upon the plaintiff to show that such delay could have been avoided by the defendant by the exercise of reasonable care, and the burden is on the plaintiff to show affirmatively that the damage was the result of the negligence of the defendant."

It is respectfully submitted that the record is destitute not only of affirmative evidence, but also of any evidence, from which, within the rules of established law, negligence on the part of the defendant in the circumstances can reasonably be deduced.

The case of New Orleans & Northeastern Railroad Company *vs.* National Rice Milling Company, 234 U. S., 80, is readily distinguishable from the instant case, for in that case, as said here, the Supreme Court of the State itself "examined the evidence, which comprehensively covered the subject (*i. e.*, whether there was actionable negligence on part of the carrier), and "from that examination it (State Supreme Court) found as matter of fact

that the second (delivering) carrier had negligently permitted the cars of rice to remain within the influence of the rising flood and in immediate proximity to the quicklime, when ordinary prudence required that they be moved to a place of safety," further declaring that, conceding all that the carrier there claimed by way of protection under the Carmack Amendment, there was nevertheless in the circumstances such evidences of carelessness and indifference on the carrier's part as "led to the inference, which we (State Supreme Court) think is positive, that there was negligence."

Declaring that as it clearly appeared from an examination of the State Supreme Court's opinion that that court had rested its judgment "upon a ground which was not only adequate to sustain it, but in entire harmony with the carrier's asserted Federal right," this Court held in consonance with a long-established and familiar principle of its jurisprudence that the writ of error was without foundation and it was dismissed.

In the instant case no such independent ground of judgment can be found, for the fundamental contention on the part of plaintiff in error is that the record is barren of any evidence whatever upon which, in the circumstances, negligence of the defendant carrier in dealing with the exempting causes which concededly existed could reasonably be predicated, or any evidence whatever from which under the instructions of the trial court the

jury could find that plaintiffs had sustained that burden of proof which was necessary to support verdicts in their favor.

The most recent application by this court of the principle of law for which the plaintiff in error is here contending under its first above-stated assignment of error occurred in *Southern Railway Co. vs. Prescott,* 240 U. S., 632, 640, wherein Mr. Justice Hughes, speaking for the court, said (at page 640):

> "And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law. Adams Express Co. *vs.* Croninger (226 U. S., 491, 506, 510); M., K. & T. Ry. Co. *vs.* Harriman (227 U. S., 657, 672). It was explicitly provided that in case the property was not removed within the specified time it should be kept subject to liability 'as warehouseman only.' The railway company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence." (Citing many cases.) "In the present case

> it is undisputed that the loss was due to fire which destroyed the company's warehouse with its contents, including the property in question. The fire occurred in the early morning when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the railway company. The trial court denied the motion for a direction of a verdict and charged the jury that 'the burden of showing that there was no negligence is on the defendant.'
>
> * * * * * * *
>
> "For the reasons we have stated, we think that the obligation of the railway company was not governed by the State law and that, in this view, the exceptions of the plaintiff in error were well taken."

And nowhere is the general subject of the carrier's liability when limited by express terms of the contract of carriage more clearly and persuasively exposed than in the comparatively recent case of *Cau vs. Texas & Pacific Railway Company,* 194 U. S., 427, 432.

The leading case upon the controlling point, of course, is *Clark vs. Barnwell,* 12 Howard, 272, wherein Mr. Justice Nelson speaking for the court said (at page 280):

> "And the main question in the case is, whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading? For, as the masters and owners, like other com-

mon carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show, that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence, it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. On this ground in the case of Muddle *vs.* Stride, 9 Car. & P., 380, which was an action against the proprietors of a

> steam vessel to recover compensation for damage to goods sent by them as carriers, Lord Chief Justice Denman, in summing up to the jury observed, 'if on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to "perils of the sea" as to negligence, the plaintiff cannot recover; but, if the perils of the seas require that more care should be used in the stowing of the goods (articles of silk and linen) on board, than was bestowed on them, that will be negligence for which the owners of the vessel will be liable. That the jury were to see clearly, that the defendants were guilty of negligence before they could find a verdict against them.' "

See also:

Transportation Company *vs.* Downer, 11 Wall., 130;

The *Glenlochy,* 226 Fed. Rep., 971, 972.

That this principle of carriers limited liability and the rules of evidence which must govern all attempts to recover damages for alleged negligence when affected by it, is both well known to and customarily has been accepted as controlling by the New Jersey Court of Errors and Appeals is evidenced by the unreported *per curiam* of that court printed as an appendix to this brief.

The remaining assignments of error would appear to have been sufficiently discussed in the brief heretofore filed in opposition to the motion to dismiss, and therefore no further discussion thereof is attempted here.

It is respectfully submitted that the judgments of the New Jersey Court of Errors and Appeals should be reversed with an instruction to reverse the judgments of the State Supreme Court and to award new trials.

FREDERIC D. MCKENNEY.
ALBERT C. WALL.
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APPENDIX.

NEW JERSEY SUPREME COURT, JUNE T., 1894.

37.

PENNA. R.
v.
WESSELS CO.

Judge's mistake as to burthen of proof.
Objection well founded.
Proof that meat in good condition when loaded and was frozen when at destination made no case for pl'ff, because freezing was excepted unless result of negligence of def't. Negligence was part of pl'ff's case and this burthen could not be thrown on def't.
New trial.

[Endorsed:] New Jersey Supreme Court. P. R. R. Co. *vs.* Wessels. Mem. Filed Feb. 25, 1895. Benj. F. Lee, cl'k.

I, William C. Gebhardt, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the opinion filed in the above-stated cause, as the same remains of record in my office.

In testimony whereof, I have hereto set my hand and the seal of said court, at Trenton, this fifteenth day of February, A. D. nineteen hundred and seventeen.

[Seal of the Supreme Court.]

WM. C. GEBHARDT, *Clerk.*

FILED
JAN 11 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 577.

THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OLIVIT BROTHERS, A CORPORATION.

No. 578.

THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

ISAAC W. CARR AND FANNIE G. ESTES, PARTNERS,
DOING BUSINESS AS ISAAC W. CARR & CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF FOR PLAINTIFF IN ERROR,

In Opposition to Motion to Dismiss Writ of Error or Affirm Judgment.

ALBERT C. WALL,
JOHN A. HARTPENCE,
FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR,

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Preliminary Statement.

These writs of error were sued out to review separate judgments of the New Jersey Court of Errors and Appeals, en-

tered in the above cases, which were two of seven similar cases brought by various plaintiffs against the same defendant, the Pennsylvania Railroad Company.

The gravamen of each case was alleged negligence on the part of defendant in failing to transport and deliver with reasonable despatch certain carloads of watermelons shipped on through bills of lading in interstate commerce from points in Georgia and North Carolina, consigned to the respective plaintiffs, who were commission brokers or merchants at destination specified in the bill of lading, viz: Jersey City, New Jersey.

The defenses in each case were—

(*a*) Absence of negligence in transportation;

(*b*) The occurring of a strike among defendant's employees serving certain of its terminals at Jersey City, accompanied and followed by a great congestion of traffic affecting all of defendant's terminals at destination, and creating a condition beyond defendant's immediate control, and

(*c*) Failure on part of the respective plaintiffs to submit claim within the periods of time limited in the various complaints.

The trial court ruled against defendant on matters of law proposed in support of each of said defenses, and submitted the cases to the jury with an instruction to return a separate verdict in each case. The jury gave verdicts in all seven of the cases against the defendant, and separate judgments of the trial court were appropriately entered.

On appeal to the Court of Errors and Appeals the judgments in the five missing cases were reversed, and those cases were remanded to the trial court for further proceedings. The ground of reversal was the failure of the plaintiffs in those cases to make claim within the time limited by the

terms of their respective bills of lading. As that question does not arise in the instant cases, we are not now concerned either with it or with any of the cases reversed on account of it.

The judgments of the trial court in the instant cases were affirmed by the Court of Errors and Appeals, and because we deem such affirmances to be erroneous in law we are here.

The transcripts of record before the Court contain references at various places to the all seven of the cases which were tried together upon the same general record. Endeavor has been made to lessen the records by omitting in printing all parts thereof not pertinent to the matters of law here relied upon for reversal. The records present no disputed matters of fact, nor any question turning upon the weight of evidence. They do present in the clearest and sharpest form the question as to whether there was a sufficiency of competent evidence to justify submission of the cases to the jury. If there was not, the verdicts were unwarranted and will not support the judgments, of which we complain.

SHORT POINT.

In each of these cases the bill of lading was the "Standard Form Straight Bill of Lading" approved by the Interstate Commerce Commission, which has not infrequently received the attention of this court. Among other "Conditions," referred to on its face and specified on its back, is the following:

> "SECTION 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.
> * * * Except in case of negligence of the car-

> rier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay * * * resulting from * * * riots or strikes."

The plaintiffs made out their respective *prima facie* cases by showing the shipments of the melons, their delivery in apparent good order to defendant (the final or destination carrier) at Edgemoor, a connecting point in Delaware; unusual length of time in transporting same from Edgemoor to delivery yard (Second and Henderson streets, Jersey City); the decayed condition of the melons on delivery and their sale at less than the price brought at the time by sound melons. Otherwise than as affected by the inclusion of freight charges paid at destination by the consignees (plaintiffs) no objection was or is made as to the amount of the damages claimed or covered by the verdicts.

Defendant, conceding delay in delivery, asserted that it was solely caused by a strike on the part of certain of its employees, and the consequent congestion of its terminals or delivery yards, such strike under the terms and conditions of the bill of lading under which shipments moved, exempting defendant from liability to respond in damages for any losses traceable thereto.

The occurrence of the strike, which began on July 10 and continued to July 18 or 21 and the great congestion of traffic resulting therefrom, which continued until about September 1, between which dates the shipments moved and the damage occurred, and the fact that the strike was beyond the control of the defendant and constituted an excepting cause under the terms of the bill of lading, were all accepted by the learned trial judge as conceded, or at least undisputed matter of fact, the existence of which made it further incumbent upon the plaintiffs to show at least *prima facie* negligence on the part of defendant in the handling of the strike itself, or the situation and conditions

resulting therefrom. This burden the plaintiffs did not attempt to sustain, and introduced no evidence bearing upon the subject. They stood upon their *prima facie* case and the added circumstance that during the strike and after congestion shipments of peaches, a highly perishable commodity, were delivered from time to time on tracks ordinarily devoted to the handling of shipments of watermelons, a less perishable commodity.

In the absence of any evidence sufficient in law to establish or tending to establish negligence on the part of defendant in not preventing the strike or in the handling of the situation or conditions caused by or resulting from it, the jury should have been instructed to return its verdicts for defendant, notwithstanding the general showing of the lapse of unusual time between shipment and delivery at destination.

In support of this proposition we rely upon

Clark *vs.* Barnwell, 12 Howard, 272.
Cau *vs.* Texas & Pacific Ry. Co., 194 U. S., 427.
Southern Ry. Co. *vs.* Prescott, 240 U. S., 632.

Statement of the Case.

The Olivit case involves the shipment of sixty-four carloads of watermelons, consigned from various points in North Carolina, to defendant in error at Jersey City, New Jersey. The plaintiff in error (hereinafter referred to as the defendant) received the shipments at Edgemoor, Delaware, from a connecting carrier, and transported them from that point to be delivered to the defendant in error (hereinafter referred to as the plaintiff) as a part of a continuous, through interstate carriage from the place of shipment to the place of destination, under bills of lading issued by the initial carriers (Rec., 126; Exhibit, p. 7). When the watermelons were delivered at Jersey City they were in a decayed condition, and were sold for less than the price of sound melons.

The time consumed in the transportation from Edgemoor to the delivery yard at Jersey City was greater, in each instance, than the usual or customary running time between those points. Defendant did not in any way dispute the three elements necessary to establish plaintiff's *prima facie* case, namely: 1, the receipt of the melons at Edgemoor, Delaware, in apparent good order; 2, the delivery thereof at place of destination in a decayed condition; and, 3, the delay in transportation beyond the usual or customary running time.

Such facts were stipulated between the parties and were proved by plaintiff upon the trial by the introduction of the stipulation in evidence, without oral testimony (R., pp. 46, 114-116).

The amount of damage was not disputed, except as to the item of freight charges paid by consignee upon the delivery of the melons at Jersey City, which item defendant contends plaintiff could not recover back as damages in this action.

Plaintiff having closed its case upon the presentation of the documentary evidence referred to, defendant thereupon proved, in accordance with section 1 of the bills of lading, that the loss, damage, and delay complained of resulted from a strike, with its resulting congestion, which was an excepted cause in each of the contracts of shipment, relieving defendant from liability. That section of the bills of lading (Exhibit, p. 7; Rec., p. 126) reads as follows:

> "* * * Except in case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay * * * resulting from a defect or vice in the property or from riots or strikes; * * *."

The bills of lading were issued by the initial carriers at the reduced rate specified in the Southern Classification, and subject to Rule 1 thereof, which was introduced in evidence

by plaintiff as part of its documentary proof (Rec., pp. 52 and 117, par. 11).

Paragraph 11 of the Stipulation (Rec., p. 117) is as follows:

> "11. All of said shipments were interstate shipments subject to the Carrier's Bill of Lading, at the regular or reduced rate specified in the rate tariffs filed with the Interstate Commerce Commission and subject also to Rule 1 of the Southern Classification filed with said Commission pertaining to said shipments which said rule shall be offered and admitted in evidence."

The strike, which commenced in the night of July 9, 1912, occurred among the employees of the defendant at piers 27, 28, and 29, in the city of New York. It continued to between July 18 and 21 (Rec., p. 54). About seven hundred men were employed at these piers, and when the strike occurred defendant was unable to handle and deliver freight consigned there. As a result of that all eastbound freight congested at the terminals of defendant on the New Jersey side of the Hudson River, in Jersey City, through which all eastbound freight to New York passes on its way from the South and West, as through the neck of a bottle, eventually filling up all the storage yards, and all available trackage, congesting and blocking the road west of Meadows, a point on the tracks about five miles west of the Hudson River waterfront, and beyond (Exhibit D 1, Rec., pp. 74, 144).

While the strike itself ended sometime between July 18 and 21, congestion resulting therefrom continued until September 1, when the road succeeded in resuming normal operations (Rec., p. 56).

By reference to the stipulation (p. 1) and the chart accompanying it (Rec., pp. 115, 116), by which the movements of the respective cars from Edgemoor to destination are shown, it will be seen that in almost every instance the melons were carried from Edgewood to Meadows within the

usual or customary time of transporting such commodities between those points, which by paragraph 4 of the stipulation aforesaid (Rec., p. 116) was shown to be "about seven hours, under the most favorable circumstances;" but from Meadows to the point of destination delays of varying duration occurred.

Having proved by uncontradicted evidence that the strike and resulting congestion were the proximate causes of the delay which resulted in the injury complained of, the defendant rested.

The only evidence introduced by plaintiff in rebuttal (which together with the documentary evidence offered in chief constituted plantiff's entire case), showed that because of the occupation of certain tracks at the Jersey City terminus by cars of "peaches and stuff like that—vegetables", consigned to pier 29, New York city, which were delivered from the Jersey City yard during the night and early morning hours from tracks usually assigned for the delivery of watermelons during the day, the actual delivery of the watermelons was sometimes delayed from the usual hour of seven o'clock in the morning to from nine of the same morning until two or three o'clock in the same afternoon; also that watermelons were delivered during the day, and "peaches and stuff like that—vegetables" were delivered at night (Rec., p. 92).

In surrebuttal defendant showed that peaches are a highly perishable fruit; that they would have spoiled if allowed to remain undelivered; and that defendant delivered them from the "only available point that we had where we could deliver them" (Rec., pp. 92, 93). The perishable quality had also been shown in defendant's main case (Rec., p. 59).

Defendant, at the close of the whole case, moved the court to direct a verdict in its favor and against plaintiff (R., 93 *et seq.*) upon the following grounds:

a. The defendant having proved that the damage complained of resulted proximately from causes excepted in the bills of lading, the burden of proof rested upon the plaintiff to show negligence of the defendant in handling the situation resulting from the proximate cause and this burden plaintiff failed to sustain.

b. There was not sufficient evidence of actionable negligence of defendant in the case to warrant its submission to the jury.

c. There was no evidence of negligence at all in the case which should require the court to submit it to the jury.

d. There was no negligence of defendant shown.

e. Under the circumstances of the case it was the duty of defendant to move the more perishable freight first, and that the court, as a matter of law, should instruct that it was not negligence on the part of the defendant to move the peaches and cantaloupes first.

f. It did not affirmatively appear in the case that the plaintiff was the owner of the property involved in the suit, or had been owner thereof at the times of shipment thereof or the damage thereto.

Each of said grounds was held by the court to be insufficient in law; the motion to direct a verdict in favor of the defendant and against the plaintiff was denied; and the case was submitted to the jury.

The jury rendered a verdict in favor of the plaintiff, Olivit Bros., for $11,613.05, the amount of damages claimed (which included freight amounting to $5,484.59, paid by consignee at destination with interest thereon for two years and seven months), and judgment was entered in the Supreme Court of New Jersey accordingly (Rec., pp. 103, 31).

Similar judgment was entered in favor of Carr & Co. (Carr Rec., 13).

Appropriate exceptions to the refusal of the trial court to direct a verdict in favor of the defendant were reserved (Rec., p. 100).

The trial court also refused to give the jury the following instruction requested by defendant:

> "14. That it was the duty of the defendant to move most perishable fruit first under the circumstances in these cases, and the holding back of less perishable fruit, viz., the watermelons, until the peaches had been delivered, was not negligence."

And defendant duly excepted (Rec., pp. 113, 114).

The cases were taken by appeal to the Court of Errors and Appeals of New Jersey and judgments were affirmed (Rec., p. 146; Carr R., 19).

The opinion of the Court of Errors and Appeals in the present Olivit Brothers case was written in the Carr case, *supra,* and is printed in the record in the Carr case (No. 578, Oct. Term, 1916), at pages 17-19. The memorandum of the Court of Errors and Appeals of New Jersey in the Olivit Brothers case (No. 577, Oct. Term, 1916), affirming the court below, is printed on page 145 of the record in that case. The records having been remitted to the Supreme Court of New Jersey by the Court of Errors and Appeals, prior to the allowance of the writ of error by this court, the writs issued to the Supreme Court of New Jersey, in accordance with practice (Rec., pp. 1 and 2).

Assignments of Error.

Defendant relies on all the errors assigned (Rec., pp. 4 and 148). They are printed in full at pages 8 and 10 in the brief of plaintiff upon this motion to dismiss and affirm, and for that reason are here omitted.

ARGUMENT.

The questions raised by the plaintiff upon this motion are considered in this brief in the same order that they appear in its brief, and are discussed in that order for convenience.

POINT I.

Federal Questions Involved.

The case is subject to and governed by the provisions of the Federal Act to Regulate Commerce (24 Stats. at Large, 379, chapter 104), with amendments, etc.

The rights and immunities, as well as the duties and obligations, of the parties are therefore to be determined by this Federal law. Defendant asserted in the courts below its immunity from liability to the plaintiff under this act unless plaintiff was affirmatively shown to be the owner of the property involved in the suit; also its immunity from liability to repay to plaintiff freight charges which were assessed and paid in accordance with the tariffs filed with the Interstate Commerce Commission, and also its right to have verdicts directed in its favor because there was no evidence, or insufficient evidence, to warrant the submission of the case to the jury.

In *St. Louis, &c., Ry. Co. vs. McWhirter* (229 U. S., 265, at 274-277), it was held that where the court below refused a motion to instruct the jury to find in favor of the defendant, because there was no evidence tending to show negligence on part of defendant, such refusal gave rise to a Federal question reviewable in this court. The Chief Justice, who delivered the opinion of the court, said at page 277:

> "Where in a controversy of a purely Federal character the claim is made and denied that there was no

> evidence tending to show liability under the Federal law, such rule when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In *Norfolk Southern R. R. vs. Ferebee* (238 U. S., 269-273), it was held that:

> "A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice."

In *Southern Ry. Co. vs. Prescott* (240 U. S., 632), it was held that the measure of liability of a carrier transporting an interstate shipment under a bill of lading issued in accordance with the Act to Regulate Commerce presented a Federal question, and the denial of a motion to direct a verdict in favor of the defendant upon the ground that, under the Federal act and the tariff regulations, the bill of lading defined the rights of the parties, was a reviewable Federal question. It was also held that the application of the State rule respecting the burden of proof, which was different from the Federal rule on that same subject in the court in which the action was tried, was the denial of a right or immunity of the defendant under the Federal law.

In *Cincinnati, &c., Ry. Co. vs. Rankin* (241 U. S., 319) this court held that the rights and liabilities of parties to an interstate shipment by rail depend upon the Federal law, the bill of lading, and common-law principles as applied in Federal tribunals, and that the interpretation and effect of such a bill of lading presents a Federal question reviewable in this court.

Under said decisions it would seem clear that the questions presented by the records in these cases are properly reviewable, and that the motions to dismiss the writ of error should be overruled.

Point II.

The Federal Questions Asserted Are Not Without Merit

(1.)

Ownership of the Property Involved.

While it is true that under the Carmack amendment (section 20 of the Act to Regulate Commerce, as amended; 34 Stats. at L., par. 7, quoted by plaintiff at page 11 of its brief), the carrier is liable to the *lawful holder* of the bill of lading, for any loss, damage or injury to the property caused by it, still the basic question whether or not the carrier is liable to any person except the owner or someone shown to be duly authorized to act for him, in a way that would render any judgment recovered in such an action against the carrier *res adjudicata* in any other action, is left open, and becomes a matter of interpretation of the Federal act. There are numerous authorities which hold that the right to sue follows title, among which are the following:

Klesea *vs.* Mfg. Co., 55 N. J. Law, 320, 323;
3 Hutch. on Carriers (3d Ed.), section 1305, p. 1553;
6 Thomp. on Negligence (2d Ed., 1905), section 7422, p. 461;
4 Elliott on Railroads (2d Ed.), section 1692, p. 755;
Levy *vs.* Weir, 77 N. Y. Supp., 917; 38 Misc. Rep., 361.

Aside from these authorities, the controlling factor in the present suit is the Federal Act to Regulate Commerce, *supra*, section 8 of which provides that:

> "Such common carrier shall be liable to the ***person or persons injured.***"

Who but the owner is injured? Who can disclose ownership better than the plaintiff, the present defendant in error? The plaintiff in error endeavored to ascertain who owned the shipments in question by filing interrogatories prior to trial, but its effort was unsuccessful owing to the action of the court below in holding such interrogatories immaterial (Rec., pp. 19, 20, 21, 31). Such action is reviewable on appeal under the practice in New Jersey, and may be and is assigned as error here.

This point was also raised, and ruled upon adversely to the defendant on motion to direct (Rec., pp. 96, 97, 100).

(2.)

The trial court erred in applying the rule of the burden of proof upon the motion to direct a verdict for the defendant.

This, we think, is clearly shown by the language of the court (Rec., pp. 93, 94), which is as follows:

> "The Court: I want first of all to understand your motion. You say that there is not any negligence shown. I do not understand under any of the cases that the plaintiff is under any obligation to show negligence. My understanding of the rule is that the burden rests upon the defendant to excuse itself by showing that it was not negligent."
>
> "Mr. Hartpence: Now we feel as the case now stands that the testimony shows affirmatively so far as the plaintiff is concerned that the proximate cause of the delay that is complained of is the stipulation or the ground set forth in the bill of lading, namely, a strike—accumulated freight—matters beyond the control of the defendant. Now, having done that, it seems to us that we have exonerated ourselves, or we have brought ourselves within the protection rather of the stipulation of the bill of lading, and it then is incumbent upon the plaintiff if he hopes to recover to show that after we have brought ourselves within

the protection of the stipulation of the bill of lading that still in one way or another we failed to handle the situation at that time in a way which was free from negligence; in other words, it shifts the whole issue, as we understand it, from the general allegation of the negligent carrying of these goods so that they deteriorated because of delay to the allegation that the injury was caused because the defendant failed to perform the duty which it was obliged to perform in the law. The whole question is whether or not when the proof is that there was the excepted cause we did what we should have done to meet the situation, and the burden there is to show that we did not do what we ought to have done.

"The Court: As a matter of pure technical law I should think you were wrong, although I think there is a whole lot of rightness in what you say. I do not think it shifts the burden at all; I do not think you have any case that says it does. I think that what happens is this: that after the plaintiff has made out the case of having delivered the goods to the company and their not having delivered them within a reasonable time, I think that casts upon the defendant the burden of establishing some excuse by way of defense. I think that excuse is an affirmative defense, and they have got to make it out by the greater weight of the evidence. I think that the burden that then rests upon the plaintiff is not of overcoming by the preponderance of the evidence that defense thus interposed, but I think that the burden then cast upon the plaintiff is the burden of merely going forward with the proof, and that then my duty is to rest the case with the jury and to tell them they are to say whether or not the defendant has made out the excuse urged by him by the greater weight of the evidence. If he had not, then I think the plaintiff is entitled to a verdict. In other words, I do not think the burden of proof shifts at all. I think that you offer a defense and you have got to make that defense out to the end of the case by the greater weight of the evidence. If you do not make it out by the greater weight of the evidence you fail. I do not think it

> shifts any burden at all; it simply shifts the burden of going forward with some evidence, if he thinks it necessary to do so, upon the plaintiff."

(3.)

There was not sufficient evidence of negligence on part of the defendant to warrant a submission of the case to the jury.

By reference to the facts set forth in the statement of the case, *supra,* it will appear that the ground of defendant's alleged liability is defendant's failure and neglect to carefully and seasonably transport the watermelons (Rec., p. 42). And, at page 51 of the record, counsel for the plaintiff stated:

> "Mr. Stout: We further desire to have noted on the record that the damage that we are claiming in all of these suits is the damage caused by the delay in the transportation of the watermelons while they were in the possession of the defendant company, due to delay, and not to any other cause; damage due to delay in transportation and not to any other cause."

This eliminates from the case all other inferences of negligence, including that suggested by the Court of Errors and Appeals of New Jersey (mentioned by plaintiff at page 18 of its brief), namely, receipt of the goods by defendant, after the strike was over. The only other circumstance asserted as a basis for an inference of negligence was the emergency delivery of peaches and other perishable freight consigned to pier 29, New York City, at the Jersey City terminus, where watermelons were also customarily delivered.

It was conclusively shown that the delay on defendant's line, which plaintiff admitted on the record was the only cause of which it complained, resulted from a strike, which was an excepted cause in the bills of lading relieving defend-

ant from liability, except in case of want of skill amounting to negligence in handling the strike, or the after congestion resulting therefrom. That the strike and resulting congestion was the proximate cause of the delay and consequent damage, has not been disputed by plaintiff. Plaintiff, however, asserts that defendant had no right to use the Jersey City yards for the purpose of delivering the freight consigned to pier 29, to the exclusion or delay of watermelons. But it will be observed that the other freight was not delivered to the exclusion of the watermelons, but only that each took its turn.

It is submitted that not only was it not negligent for defendant to thus use its judgment in handling perishable freight in such an emergency as was there presented, but that on the contrary it was its duty to do just what it did do, and for that reason, if for no other, the court should have ruled that no negligence had been shown in the case, and directed a verdict for defendant; and it also should have charged the jury as requested by defendant, that "that it was the duty of the defendant to move most perishable freight first under the circumstances of this case, and the holding back of less perishable freight, viz., the watermelons, until the peaches had been delivered, was not negligence" (Rec., p. 114).

2 Hutchinson on Carriers, 3d Ed., sec. 649, p. 713.

After the defendant had proved the excepted cause in the bill of lading as the proximate cause of the delay complained of, the burden was on the plaintiff to show negligence of the defendant in the handling under that excepted cause, or that the damage could have been averted, notwithstanding the existence of the excepted cause, by the use of reasonable skill and diligence.

Clark *vs.* Barnwell, 12 Howard, 272;
Cau *vs.* Tex. & Pac. Ry. Co., 194 U. S., 427;
Southern Ry. Co. *vs.* Prescott, 240 U. S., 632;
Michaels *vs.* Adams Express Co., 71 N. J. L., 41.

The trial court did not indicate any specific evidence of negligence on part of defendant in the case, but left it to the jury to say whether there was any such evidence upon which to predicate liability of the defendant (Rec., p. 109).

If there was not sufficient evidence of negligence in the case to warrant its submission to the jury, or if there was no such evidence, it was the duty of the trial court to have so declared and to have directed verdicts for the defendant. The trial court, however, and also the Court of Errors and Appeals, seems to have proceeded upon the theory that if there was even a scintilla of evidence in the case upon which to predicate negligence generally, the case had to be submitted to the jury. This is not the true rule either in New Jersey or in this court.

Baldwin *vs.* Shannon, 43 N. J. L., 596;
Pleasants *vs.* Fant, 22 Wallace, 116.

There were no disputed facts in the case, nor was there any conflict of testimony. There was no evidence in the case tending to show that defendant by the exercise of reasonable skill and attention could have delivered the watermelons sooner than it did, notwithstanding the strike; nor was there any evidence to show that defendant could have prevented the occurrence of the excepted cause. On the contrary, it is undisputed in the case that the strike started at a point not connected with defendant's business, and that defendant's employees were led to strike through fear or pressure from the outside. It was a sympathetic strike, and almost completely paralyzed defendant's operations.

The burden was on the plaintiff to show that this might have been averted, if it could have been. It was not incumbent upon defendant to excuse itself from the general allegation of negligence when the issue was made by the proof of the excepted cause. The plaintiff having failed to sustain the burden of proof, there was no justification in law for leaving it to the jury to speculate regarding defendant's possible negligence in the circumstances.

(4.)

The plaintiff should not recover back as part of its damages the freight paid upon delivery at destination.

The prohibition of the statute against deviation from the filed tariffs and schedules, and against rebates and undue preferences and discriminations, is so firmly established that an extended discussion of it at this time is deemed unnecessary. While no suggestion can be made that in this case there was any attempt to evade the statute or tariffs so as to benefit a favored shipper, yet it is the possibility of such a result that has moved the courts to set the stamp of disapproval upon any proceeding which might tend to violate the purpose and spirit of the act. The possibility of a carrier rebating to a favored shipper through the medium of a fictitious claim and a suit for damages is obvious. And, indeed, this was pointed out and condemned in *Ill. Cent. R. Co. vs. W. L. Hooper & Sons* (223 Fed., 135).

For this very reason defendant contends that freight should be held inviolate as freight, and that, unless the situation falls specifically within the approved terms of the uniform bill of lading, freight paid upon shipments the carriage of which has been completed should not be included in the assessment of damages.

All the cars were carried to destination, and the contents were sold, either by the consignees or by the carrier on account of the consignees. Where the property is carried, the freight accrues and must be paid.

2 Hutch. on Carriers (3d Ed.), sec. 802, p. 890.

The mere fact of the freight being damaged and sold for less than its true value, being sold for a greater or less amount cannot operate to change this rule; otherwise freight would be collectible only if full value were realized. The car-

rier's charge is not based upon the success or non-success of the owner's sale. Any other view would be violative of the sections 2 and 6, of the Interstate Commerce Law, above quoted. In the present cases the carrier was bound to charge and collect the freight, and the plaintiff's having paid it, cannot now have it refunded through the medium of the verdict of a jury.

Tex. & Pac. Ry. Co. *vs.* Abilene Oil Co., 204 U. S., 491; 51 L. Ed., 553;
Tex. & Pac. Ry. Co. *vs.* Mugg, 202 U. S., 242; 50 L. Ed., 1011;
Kan. C. So. Ry. Co. *vs.* Carl, 227 U. S., 639; 57 L. Ed., 683;
Erie R. R. Co. *vs.* Wanaque Lumber Co., 75 N. J. Law, 878;
Ill. Cent. *vs.* Hooper, 233 Fed., 135;
Chicago *vs.* Stein, 233 Fed., 716;
P. R. R. Co. *vs.* Quinn & Co., 37 N. J. L. J., 47;
Poor Grain Co. *vs.* C., B. & Q. Ry., 12 I. C. C., 418;
L. & N. R. R. Co. *vs.* Maxwell, 237 U. S., 94; 59 L. Ed., 853;
Armour *vs.* U. S., 209 U. S., 56, 83; 52 L. Ed., 681;
P. R. R. Co. *vs.* Int. Coal Mining Co., 230 U. S., 184; 57 L. Ed., 1446;
Mitchell *vs.* P. R. R. Co., 230 U. S., 247; 57 L. Ed., 1472;
Loomis *vs.* L. V. R. R. Co., 240 U. S., 43; 60 L. Ed., 228.

It is respectfully submitted, therefore, that the motion of the defendant in error to dismiss or affirm should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1916.

No. 577.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

v.

OLIVIT BROTHERS, a Corporation.

No. 578.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

v.

ISAAC W. CARR and FANNIE C. ESTES, Partners doing business as I. W. CARR & Co.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

QUEEN & STOUT,
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Doing Business as I. W. Carr & Co.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

Motion to dismiss the writ of error in each of these cases, coupled with a motion to affirm the judgments of the Court below, was submitted to this Court upon

briefs and the cases have been placed on the summary docket.

In this brief, defendants in error will reply to the brief for plaintiff in error on these motions, and will also submit an argument on the merits of the questions involved.

The statement of the case, the questions involved, and the specification of errors are set forth in the brief for defendants in error on these motions.

Reply to Brief for Plaintiff in Error on These Motions.

(a) *Misstatement of the case by plaintiff in error.*

Plaintiff in error in its brief in opposition to the motion to dismiss and affirm has made many erroneous statements of the record.

On page 2 of its brief, plaintiff in error states that the watermelons in question were consigned to the respective plaintiffs, who were commission brokers or merchants. There is no evidence in these cases showing in what capacity the watermelons were consigned to the plaintiffs. The only testimony on this point is that the plaintiffs were the lawful holders of the bills of lading at the time of the bringing of the actions, and at the time of the trial. It also states that the strike occurred among its employees serving certain of its terminals at Jersey City. The fact is that there was no strike among defendant's employees at any of its Jersey City terminals, but the strike was among its employees at Pier 29, New York City.

On page 5, it states that the plaintiffs did not attempt to sustain the burden of showing negligence of the defendant. The evidence clearly shows that the plaintiffs sustained this burden by proving that the negligence consisted in the defendant delivering at the Jersey City terminal, peaches billed to New York City, and that this produced the congestion which caused the

delay in delivering the watermelons. It also states that the peaches were more perishable than the watermelons. And on page 9 it urges as one of its grounds for reversal, that the Trial Judge should have ruled that it was the duty of the defendant to move the more perishable freight first, under the circumstances in these cases. Plaintiff in error has not assigned this as error (Rec. 4, 5 and 6). There is no evidence in these cases that the watermelons in the condition in which they arrived at Jersey City were less perishable than the peaches. The Court of Errors and Appeals of New Jersey said (Carr Rec. 19): "There is no evidence that the peaches in question were more perishable than the watermelons in question at the time both were being handled by the defendant company, and it would have been improper for the Trial Judge to have assumed to determine that question as a matter of law."

On page 7, it states that all its storage yards and tracks were filled as a result of the strike. There is no proof of this. Furthermore, if the defendant had held the peaches on the storage tracks until the watermelons were delivered, or if it had refused to accept peaches billed to Pier 29, New York City, during the strike, the congestion which the defendant produced would have been avoided. It also states that while the strike itself ended sometime between July 18th and 21st, 1912, the congestion resulting therefrom continued until September 1st, 1912. The congestion was not the result of the strike, but was produced by the manner in which the defendant handled its freight during the strike.

On page 8, it states that having proved by uncontradicted evidence that the strike and the resulting congestion were the proximate cause of the delay which resulted in the injury complained of, the defendant rested. The uncontradicted evidence is that the di-

verting of peaches billed to New York City and delivering them on the watermelon tracks in the Jersey City Delivery Yard was the proximate cause of the congestion and resulting delay, instead of the strike. It also states that the peaches were delivered from the only available point it had in Jersey City. The question is not whether the defendant had any other place in Jersey City to deliver these peaches, but whether it had the right to exclude the watermelons by delivering the peaches on the watermelon tracks. The evidence is that the peaches could have been stored where the watermelons were stored (Rec. 93).

On page 14, it states that the Trial Court erred in applying the rule of the burden of proof upon the motion to direct a verdict for the defendant and quotes a part of the Judge's rulings, but omits what the Judge said was the real issue for the jury to decide, viz., whether the strike was the proximate cause of the delay or the manner in which the defendant handled its freight during the strike (Rec. 95). If there was any evidence of negligence to go to the jury, it is of no consequence how the Judge ruled on the motion to direct a verdict, for he properly charged the jury (Rec. 110) that the burden of proving negligence was on the plaintiff.

On page 16, it quotes from the record that the damages claimed by the plaintiff were those caused by delay and not by any other cause. The defendant says this eliminates from the case all other inferences of negligence. It is to be noted that this statement of plaintiff's counsel was made at the request of defendant (Rec. 52) for the purpose of substituting the word "decay" for "damages" and that the defendant should be liable only for damages caused by delay and not rough handling of the watermelons. Such damages included all damages to the watermelons resulting from decay, which occurred while they were being delayed

in transportation for any cause for which the defendant was responsible. Since this statement was made for the benefit of the defendant, an attempt to place an erroneous and misleading interpretation upon it should not go unchallenged. It also speaks of the emergency delivery of peaches on the watermelon tracks. There is no evidence in these cases that the defendant was compelled to deliver the peaches billed to New York City at the Jersey City Delivery Yard. Probably it was more convenient for the defendant to deliver them there than to find a place elsewhere. But if the defendant had refused to accept peaches billed to New York City, during the strike, no emergency such as the defendant speaks of would have arisen.

On page 17, it states that the plaintiff has not disputed that the strike and the resulting congestion was the proximate cause of the delay and consequent damage. That the plaintiffs dispute this is too obvious for re-statement. They contend that the strike was not the proximate cause of the delay, but the manner in which the defendant handled its freight during the strike.

(b) *Authorities relied upon by plaintiff in error to sustain jurisdiction are not in point.*

Plaintiff in error in its brief, pp. 11 and 12, cites: *St. Louis &c. Ry. Co.* v. *McWhirter,* 229 U. S. 265; *Norfolk Southern R. R.* v. *Ferebee,* 238 U. S. 269; *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632, and *Cincinnati &c. Ry. Co.* v. *Rankin,* 241 U. S. 319, to show that there are Federal questions raised in the record which are properly reviewable by this Court.

In the *McWhirter case, supra,* the Court below ruled that, under the Federal Hours of Service Act of March 4th, 1907, and the Federal Employers Liability Act of April 22nd, 1908, the mere act of negligence of the employer in permitting an employee to work beyond the statutory period created liability irrespective

of the connection between the alleged negligence and injury complained of. There was no proof that the accident was attributable to the act of working overtime.

The question thus presented called for the construction of a Federal statute and this Court on review held that: "Where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

The instant cases do not involve the construction of a Federal law.

1. Because the parties have expressly stipulated in the language of the Carmack Amendment that the plaintiffs are the lawful holders of the bills of lading.

2. Because there was proof of negligence and the Trial Judge charged the jury that the burden of proof was on the plaintiffs.

3. Because the bills of lading provided that the plaintiffs were entitled to recover the amount of the freight paid by them as a part of their damages.

The *Ferebee case, supra,* is not in point, because it does not appear in the cases at bar that a substantive right or defense arising under the Federal law has been lessened or destroyed by a rule of practice.

The *Prescott case, supra,* does not aid the plaintiff in error in maintaining jurisdiction, because the Trial Judge in the present cases ruled in accordance with the decision in that case, that the liability of the defendant was governed exclusively by the Federal Act, tariff regulations, and the bills of lading (Rec. 106, 107) and that the burden of proof was upon the plaintiffs to establish the defendant's negligence (Rec. 110).

The record in the instant cases also shows that the Trial Judge ruled within the language of the *Rankin*

case, supra, which holds that the rights and liabilities of parties to an interstate shipment by rail depend upon acts of Congress, the bill of lading and common law rules as accepted and applied in Federal tribunals (Rec. 106).

It is insisted that the above authorities do not confer jurisdiction upon this Court in the present cases, nor do they show that a Federal question is presented in the record.

The case of *New Orleans & N. E. R. R. Co.* v. *National Rice Mill. Co.,* 234 U. S. 80, is squarely on all fours with the cases at bar.

The plaintiff in that case brought an action under the Carmack Amendment to recover for the loss of an interstate shipment of rice, caused by an extraordinary flood, the waters of which reached some cars containing quick-lime, which started a fire and spread to the rice. The bills of lading, under which the shipments were made, contained stipulations that the carrier should not be held responsible for loss or damage unless, through proved carelessness or negligence of their employees, resulting * * * from heat, cold, fire, flood, storms, &c., or other causes not subject to the carrier's control, and that the carrier should not be liable for any damage to or destruction of said property by fire unless such damage or destruction should result directly and exclusively from their negligence or that of their employees, and unless such negligence should be affirmatively established by the owner. At the trial it was particularly urged as a part of the defendant's contention that the burden was upon the plaintiff to show such negligence and not upon the carrier to show the absence of it.

The Court below, although disapproving this contention and thinking the carrier was charged by the law of Louisiana with the burden of showing that there was no negligence, did not rest its judgment upon that

ground. On the contrary it examined the evidence which comprehensively covered the subject to ascertain whether, upon the hypothesis that the contention of the carrier was sound, it was liable, and from that examination *the Court found as a matter of fact* (our italics) that the carrier had negligently permitted the cars of rice to remain within the influence of the rising flood and in immediate proximity to the quick-lime, when ordinary prudence required that they be moved to a place of safety.

In that case, as in the instant cases, the testimony upon which the Court below rested its conclusion that negligence was proved did not come from the plaintiff's witnesses but from those of the carrier, and was largely elicited from cross-examination. Mr. Justice Van Devanter, at page 86, said: "That is quite immaterial. The plaintiff was entitled to the benefit of all the testimony in the case from whatever source it came, and was not required even though having the burden of proof to go through the ceremony of proving any fact otherwise established."

A motion to dismiss was presented along with the merits, and this Court, dismissing the writ of error for want of jurisdiction, said: "As it clearly appears that the judgment rested upon the ground which was not only adequate to sustain it, but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right in the sense contemplated by Sec. 237 of the Judicial Code (36 Stat. at L. 1156, Chap. 231, U. S. Comp. Stat. Supp. 1911, P. 232). Whether the right was well-founded we, therefore, need not consider."

(c) *This Court will not review the rulings of the Trial and Appellate Courts below on the question of negligence, unless clearly erroneous.*

The Trial Court ruled that there were questions of

negligence to be submitted to the jury and the Appellate Court unanimously affirmed that ruling.

That there was evidence of negligence for the jury, see Point III, *infra.*

The concurrent determination of the State trial and Appellate Courts that there was evidence of negligence will not be disturbed by the Federal Supreme Court on writ of error, unless clearly erroneous.

Baltimore & O. R. Co. v. *Whitacre,* 242 U. S. 169.

Baugham v. *N. Y., P. & N. R. Co.,* 241 U. S. 237.

Seaboard Air Line Ry. Co. v. *Renn,* 240 U. S. 290.

Great Northern R. Co. v. *Knapp,* 240 U. S. 464.

In the *Whitacre case, supra,* this Court held that only in case of clear and palpable error will a uanimous ruling of the highest State Court that the Trial Court had properly left to the jury the question of negligence be disturbed by the Federal Supreme Court on writ of error.

ARGUMENT ON THE MERITS.

POINT I.

The Plaintiffs, as the Lawful Holders of the Bills of Lading, Are Entitled to Maintain the Actions Against the Defendant.

The plaintiff in error, on page 13 of its brief on the motion to dismiss and affirm, contends that the lawful holder of the bill of lading must show that he is the owner (or authorized to act for the owner) in order

to maintain an action under the Carmack Amendment.

This point has been fully answered in the negative under Point 1, subd. (1), and Point II, subd. (1), pp. 11, 14 and 15 of brief for defendants in error on motion to dismiss and to affirm.

If, under the Carmack Amendment, the lawful holder of a bill of lading must be the owner of the property (or someone authorized to act for him)—which the plaintiffs deny—manifestly, the defendant by stipulating that the plaintiffs were the lawful holders of the bills of lading has thereby eliminated that question.

In the case of *Kansas City S. R. Co.* v. *Carl*, 227 U. S. 639, an action was brought by the holder of a bill of lading against a delivery carrier. Mr. Justice Lurton, at page 648, said: "As the shipment was interstate, the contract was controlled by the 20th Section of the Act of Congress of June 29th, 1906" (Carmack Amendment). * * * The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the Act as measured by the original contract of shipment so far as it is valid under the act."

The contract in the instant cases was that the carriers under the Carmack Amendment should be liable to the lawful holder of the bills of lading, for any loss, damage or injury, &c., and the defendant has stipulated that the plaintiffs are the lawful holders of these bills of lading.

The plaintiff in error, on page 13 of its brief, cites Sec. 8 of the Interstate Commerce Act, as controlling in the present actions.

It is to be observed that this section creates a liability for the violation of this Act. The actions at bar were instituted under Sec. 20 of this Act, which creates a liability in favor of the lawful holder of a bill of lading for any loss, damage or injury to an interstate shipment of property.

There is no contention in the instant cases that any section of this Act has been violated, but the plaintiffs seek to recover damages under the Carmack Amendment for injury to property. Obviously, the 8th Section of this Act has no application.

Mr. Justice Lurton, in *Atl. C. L. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 208, said: "But that section (8th sec.) applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery 'of damages sustained in consequence of any such violation of this act' &c. The cause of action in the present case is not for damages resulting from 'any violation of the provisions of this act'. True, the plaintiff in error attempted by contract to stipulate for a limitation of liability to a loss on its own line, and in this action has defensively denied liability for a loss not occurring on its own line. But the cause of action was the loss of the plaintiff's property which had been intrusted to it as a common carrier and that loss is in no way traceable to the violation of any provision of the act to regulate commerce. Having sustained no damage which was a consequence of the violation of the act, the section has no application to this case."

It is submitted that under the Carmack Amendment and the stipulation the plaintiffs' right to maintain the actions was conclusively established.

POINT II.

The Strike Was Not the Proximate Cause of the Plaintiffs' Damages.

The plaintiff in error, on page 8 of its brief, states as an incontrovertible fact that the strike was the proximate cause of the delay.

On this question the following facts are to be noted: (1) that the strike did not occur between the point where the defendant received the watermelons and the point of delivery; (2) that the first shipment in these cases was received by the defendant at Edgemoor after the strike was over and during the congestion at Jersey City (Rec. 114; Ex. P.—1); (3) that watermelons had not been delivered at Pier 29 New York City for many years previous to the strike and that the strikers there were in no way connected with the Jersey City Delivery Yard; (4) that peaches and other fruits billed to Pier 29 were unloaded by employees of the defendant; (5) that watermelons delivered at the Jersey City Delivery Yard were unloaded by the consignees or their representatives; (6) that during the period of the strike and the congestion peaches and other fruits billed to Pier 29 were delivered on the watermelon tracks at Second & Henderson Streets to the exclusion of watermelons; (7) that the using of the watermelon tracks for the delivery of peaches and other fruits billed to Pier 29 prevented the delivery of the watermelons.

It is to be observed that the bills of lading in these cases do not exempt the carrier from liability for damages due to delay occasioned by an accumulation of freight or to any other cause over which the carrier had no control, but they only exempt the carrier from damages due to delay from a strike, when it is free from negligence (Rec. 126 Ex. P.-7).

Manifestly, the strike was not the sole and proximate cause of the delay, but the negligent acts of the defendant caused the delay.

If the strike had occurred among the employees of the defendant who operated the trains between Edgemoor and Jersey City Delivery Yard, thereby preventing all traffic between these two points, such a strike might have been the sole and proximate cause of the

delay in the transportation of the watermelons; or if the strike had occurred among the employees of the defendant at the Jersey City Delivery Yard, preventing the delivery of watermelons there, such a strike might also have been the sole and proximate cause of the delay. In the cases at bar, neither of these situations existed. The delay in question was not caused by the strike at Pier 29, but was the result of the defendant, during the period of the strike, delivering peaches and other fruits billed to Pier 29, on the watermelon tracks in the Jersey City Delivery Yard.

(a) *When a carrier relies upon the excepted cause, either at common law or under contract, it must show, in order to excuse itself, that the excepted cause is the sole and proximate cause of the injury.*

New Brunswick Steamboat Co. v. *Tiers,* 24 N. J. L. 697.
Reid v. *Evansville &c. R. Co.,* 10 Ind. App. 385.
Merritt v. *Earle,* 29 N. Y. 115.
King v. *Shepard,* 3 Story (U. S.) 349, 14 Fed. Cas. No. 7804.

In the cases of *Clark* v. *Barnwell,* 12 How. 272; *Cau* v. *Texas & Pac. Ry. Co.,* 194 U. S. 427, and *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632, cited on pages 5 and 17 of brief for plaintiff in error, it is to be observed that the damages complained of was occasioned directly by the excepted cause and that no act of the carrier intervened between the excepted cause and the actual injury. In the cases under review, the defendant intervened between the strike and the injury by delivering peaches and other fruits billed for Pier 29 on the watermelon tracks and by holding the watermelons on the storage tracks until they were decayed.

Whether the strike was the proximate cause of the delay was obviously a question of fact for the jury.

POINT III.

The Negligence of the Defendant Was Clearly Established.

In *Charnock* v. *Texas R. R. Co.*, 194 U. S. 432, this Court said: "Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances."

It was for the jury to say whether the following acts and conduct of the defendant constituted negligence: (1) Diverting of peaches billed to Pier 29, New York City, to the Jersey City Watermelon Yard; (2) using the watermelon tracks for the delivery of peaches to the exclusion of watermelons; (3) preventing the delivery of the watermelons until the peaches and other fruits billed to Pier 29 had been delivered on the watermelon tracks; (4) holding the watermelons on the storage tracks until the peaches and other fruits billed to Pier 29 had been delivered on the watermelon tracks; (5) causing an accumulation of freight by delivering peaches and other fruits billed to Pier 29 on the watermelon tracks; (6) failing to notify the initial carriers not to receive peaches and other fruits billed to Pier 29; (7) failing to notify the initial carriers and shippers that watermelons billed to Jersey City Delivery Yard would not be delivered without delay; (8) giving the consignees of peaches billed to Pier 29 preference in the use of the watermelon tracks.

It is obvious from this recital of the acts and conduct of the defendant that it was for the jury to say whether the defendant performed the duty imposed upon it by law to deliver the watermelons within a reasonable time.

In the case of *Carr* v. *D. L. & W. R. R. Co.*, 81 N. J. L., 532, the Court of Errors and Appeals, at page 534,

said: "Whether the delay in delivering, under the circumstances, was reasonable and justifiable was a jury question."

In the case of *Burr* v. *Adams Express Co.*, 71 N. J. L. 263, 269, Mr. Justice Pitney said: "In this case, as in all cases where questions of reasonable time, opportunity or the like are at issue, the determination of what is reasonable, where the facts are in dispute, *or the inference to be drawn from undisputed facts is in doubt* (our italics), is a question of fact and not of law."

This principle was cited with approval by the Court of Errors and Appeals in *Berg v. Rapid Motor Vehicle Co.*, 78 N. J. L. 724.

POINT IV.

It Was the Defendant's Duty to Inform the Shippers That It Would Not Deliver the Watermelons Within a Reasonable Time. Having Failed to Do This, It Must Answer for the Consequences of the Delay.

Helliwell v. *Grand Trunk Ry. Co.*, 7 Fed. 68.
Tierney v. *N. Y. C. & H. R. R. Co.*, 76 N. Y. 305.
Carr v. *D. L. & W. R. R. Co.*, 81 N. J. L. 532.

All of these shipments were received by the defendant at Edgemoor and even by the initial carriers for transportation to Jersey City after the strike was over and during the congestion (Rec. 29).

No notice was given by the defendant to the initial carriers or to shippers that watermelons billed to Jersey City would not be delivered within a reasonable time; consequently, the defendant, under the above authorities, is liable to the plaintiffs for the damages resulting from the delay.

POINT V.

Plaintiffs Were Entitled to Recover the Freight Paid by Them as a Part of Their Damages.

It was stipulated that the damages of the plaintiffs should be computed on the basis of the value of the property at the place and time of shipment (Rec. 47). It was further stipulated in the Olivit case that the value of the watermelons at the place and time of shipment was $13,465.00 (Rec. 117), and that the plaintiff sold them for $8,895.00 (Rec. 117), which was the best price it could obtain for them owing to their damaged condition (Rec. 117). It was also stipulated that the plaintiff, on the delivery to it by the defendant of the watermelons, paid to the defendant all the freight charges for transportation of same, amounting to $5,484.59 (Rec. 117). Similar stipulations were made in the Carr case (Rec. 15).

The damages of the plaintiff in the Olivit case, computed upon this basis, are as follows: (Rec. 103.)

Value of watermelons at place and time of shipment		$13,465.00
Sold for (owing to their damaged condition)	$8,895.00	
Freight paid	5,484.59	
Net Proceeds of Sale		3,410.41
Damages		$10,054.59
Interest for 2 years, 7 months (not disputed)		1,558.46
Total Damages		$11,613.05

Under these stipulations, the plaintiffs were entitled to be made whole for the value of the watermelons at the place and time of shipment. To recover the damages sustained by it based upon this value, the plaintiffs must receive from the defendant the difference between this value and the proceeds of the sale, less the freight paid. If the freight paid were not deducted from the amount realized for the damaged watermelons, the damages would not be computed on the basis of the value of the watermelons at the place and time of shipment, but upon their value less the freight. If there had been a complete destruction of the watermelons in transit, no freight would have been paid and the defendant would have been liable for the full value of the watermelons at the place and time of shipment.

In the instant cases, the plaintiffs paid the freight accepted the damaged watermelons, sold them at the best price obtainable, and deducted the freight paid from the amount realized, and gave the defendant credit for the net proceeds of sale on account of the value of the watermelons at the place and time of shipment.

The plaintiff in error, on page 19 of its brief, suggests that to permit the defendants in error to recover the amount of the freight paid as a part of their damages might possibly be rebating. It does not point out how this might happen, but distinctly says that no suggestion can be made in these cases of such a possibility.

The fact is that the rule of damages applied in these cases does not violate any section of the Interstate Commerce Act and the authorities cited by the plaintiff in error on pages 19 and 20 of its brief are not in point.

The true meaning of a stipulation in a bill of lading limiting the value of the property to the place and time of shipment is discussed in the following cases and the

courts held that *where the property was injured by the carrier the freight paid by the shipper should be recovered as part of the damages.*

Pearse v. *Quebec Steamship Co.*, 24 Fed. 285.
Brown v. *Cunard Steamship Co.*, 147 Mass. 58.
Pierce v. *Southern Pacific Co.*, 120 Cal. 156.
Horner v. *R. R. Co.*, 70 Mo. App. 285.
Kelly v. *Southern R. Co.*, 84 S. C. 252.

Furthermore, the bills of lading provided that the damages were to be computed on the basis of the value of the property (being the invoice price, if any, including freight charges, if prepaid) at the place and time of shipment. When the damages are based on the invoice value (here the stipulated value at the place and time of shipment), it is immaterial as a measure of damage whether the freight is paid at the initial point or the delivery point.

In *New York P. & N. R. Co.* v. *Peninsula Province Co.*, 240 U. S. 34, it was held that: "An erroneous instruction as to the measure of damages in an action against a carrier under the Carmack Amendment will not justify a reversal of a judgment for the plaintiff, where it did not exceed the maximum liability fixed by the bills of lading."

In the *Olivit* case, the maximum liability fixed by the bills of lading was $13,465.00 (Rec. 117), the value of the watermelons at the place and time of shipment. The amount of the judgment was $11,613.05 (Rec. 31).

Likewise in the *Carr* case the amount of the judgment did not exceed this maximum liability fixed by the bills of lading.

We submit that under the stipulations and the bills of lading, the Trial Judge properly charged the jury that the plaintiffs were entitled to the freight paid as a part of the damage.

The writs of error should be dismissed and the judgments below affirmed.

Respectfully submitted,

QUEEN & STOUT,
Attorneys for Defendants in Error.

EDWARD P. STOUT,
Of Counsel.

PENNSYLVANIA RAILROAD COMPANY *v.* CARR ET AL., PARTNERS, DOING BUSINESS AS ISAAC W. CARR & COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 578. Argued April 9, 10, 1917.—Decided April 30, 1917.

Decided on authority of *Pennsylvania R. R. Co.* v. *Olivit Brothers, ante,* 574.

88 N. J. L. 235, affirmed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. Albert C. Wall, Mr. John A. Hartpence* and *Mr. John Spalding Flannery* were on the briefs, for plaintiff in error.

Mr. Edward P. Stout, with whom *Mr. George S. Hobart* was on the briefs, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in seven counts praying for damages caused by delay in the delivery of certain watermelons received for shipment and accepted by an initial carrier at certain places in the State of Georgia to be transported to Jersey City, New Jersey, and transferred in good condition to defendant's line at Edgemoor, Delaware, a point on the route.

A violation of the contract of carriage is charged in that the melons were not transported within a reasonable time, by reason of which a large part of them was lost and the rest delivered in a damaged condition.

The defenses were denials of the allegations of the complaint and an averment that the delay in delivery was caused by a strike on the road, for which cause, under the bills of lading issued by the initial carrier pursuant to the Interstate Commerce Act, defendant was exempt from liability for damages. This was one of the defenses in No. 577, with which this case was submitted.

Judgment was entered for plaintiff by consent and that plaintiff's damages be assessed at $1,841.13, "reserving to defendant the right to reduce said judgment in accordance with its exceptions and objections pertaining to the measure of damages and without prejudice to defendant to appeal from said judgment pursuant to law."

The judgment was affirmed by the Court of Errors and Appeals. 88 N. J. L. 235. Indeed, it was upon the opinion in the latter case that the Court of Errors and Appeals decided No. 577.

On the authority of No. 577 the motion to dismiss which is made is overruled and the judgment is

Affirmed.